Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THOMAS DAVID JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tennessee Court of Appeals erred when, in conflict with a century of this Court's precedents and the decisions of multiple other courts, it treated the Federal Employers' Liability Act – which deviates from common-law principles only when the statute explicitly requires it – as implicitly abrogating the ordinary standards for proving negligence.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that the Burlington Northern Santa Fe Railroad Company was a party to the proceedings in the court whose judgment is sought to be reviewed, along with the parties listed in the caption.

RULE 29.6 STATEMENT

Norfolk Southern Railway Company ("Norfolk Southern") has a parent company, the Norfolk Southern Corporation, which is publicly traded. No other publicly held company owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norfolk Southern respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Tennessee.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion of the Court of Appeals of Tennessee affirming the judgment of the trial court is unreported, but is available at 2009 WL 112561, and is reproduced in the Petition Appendix ("Pet. App.") at 1a-63a. The order of the Supreme Court of Tennessee denying an application for permission to appeal is reproduced at Pet. App. 67a-68a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 2009. Pet. App. 1a. The Supreme Court of Tennessee denied the application for permission to appeal on August 31, 2009. Pet. App. 67a. On November 23, 2009, Justice Stevens granted an extension to and including December 30, 2009 to file a petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, are reproduced at Pet. App. 74a-75a. The relevant instructions provided to the jury are reproduced at Pet. App. 69a-71a.

STATEMENT OF THE CASE

FELA allows recovery for a railroad employee's workplace injury or death "resulting in whole or in part from the negligence" of the railroad. Absent express statutory language to the contrary, elements and defenses that existed at common law govern negligence actions under FELA. *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949). And, in a series of cases beginning shortly after FELA's enactment, this Court repeatedly held and reaffirmed that negligence actions under FELA require the plaintiff to prove traditional, common-law proximate cause. *E.g.*, *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 118-120 (1913); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913); *infra* at 19 n.11.

In an infelicitous phrase, however, that has spawned profound confusion and deep division throughout the state and federal courts,[1] this Court wrote in *Rogers* v. *Missouri Pacific Railroad* that under FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." 352 U.S. 500, 506 (1957) (emphasis added). Nothing in *Rogers* purported to overrule the cases that came before it, but – contrary to this Court's established rule, see *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) – numerous courts have treated *Rogers* as having overruled them implicitly. The

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[1] State and federal courts share jurisdiction over FELA claims, but both apply the law "established and applied in the federal courts." *Urie*, 337 U.S. at 174 (internal quotation marks omitted); *see also* 45 U.S.C. § 56.

result has been a half-century's worth of disarray among federal and state courts alike.

In *Norfolk Southern Railway* v. *Sorrell*, this Court resolved one aspect of that confusion: It clarified that under FELA, the standards for railroad negligence and employee comparative negligence are the same. 549 U.S. 158, 160 (2007). *Sorrell*, however, declined to address a related conflict that is both more persistent and more important – namely, whether FELA departed from the traditional common-law rule of proximate causation. *Id.* at 171-72. Illustrating both the depth of the division and the importance of the issue, four members of this Court addressed this issue in competing concurring opinions. Justices Scalia and Alito joined Justice Souter's separate opinion, which explained that proximate cause was the common-law rule in negligence actions before FELA; that FELA did not expressly abrogate that rule; and that this Court never has held otherwise. *Id.* at 172-77 (Souter, J., concurring). In a dueling concurrence, Justice Ginsburg expressed the contrary view – that FELA adopted a "relaxed" causation standard that was articulated in *Rogers*. *Id.* at 178 (Ginsburg, J., concurring in the judgment).

The division on this Court mirrors a square conflict in the lower courts on the same issue, which both predated *Sorrell* and has deepened since. Lower courts continue to disagree as to whether the phrase "even the slightest" in *Rogers* signals a departure from the common-law standard of proximate causation. See *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring). Courts similarly disagree over whether this phrase imposes a "slight" negligence standard that heightens the duty of care beyond the baseline common-law rule. These divisions thwart

FELA's clear purpose to "'create uniformity throughout the Union'" in cases involving injuries to railroad employees. *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908)). Instead, railroads engaging in multistate operations face different duties from one state to the next; indeed, even within certain states, the federal and state courts employ conflicting rules under this federal statute. Certiorari is warranted to resolve this clear division of authority.

A. Statutory Background

Since its enactment in 1908, FELA has preempted state law tort remedies in favor of a unified federal remedial scheme for cases involving railroad workplace injuries. See *Sorrell*, 549 U.S. at 166. FELA is not, however, a traditional workers' compensation statute; it does not provide injured workers with strictly capped recoveries in exchange for no-fault liability. Instead, it requires that an injured railroad employee prove negligence, and if he or she does, then the recovery is generally the same as in any tort case.

Of relevance to this petition, a FELA claim includes two fundamental elements: "(1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury." *Id.* at 169. These substantive elements of a FELA negligence claim are defined by common-law principles, unless and to the extent that they are expressly modified by the statute. *Urie*, 337 U.S. at 174. FELA's principal departure from common-law standards was its adoption of a comparative negligence regime in place of the contributory negligence rule that existed at the time of the statute's enactment. 45 U.S.C. § 53 ("the

fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee").[2]

Relevant here, Section one of the Act makes "[e]very common carrier by railroad . . . liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] *in whole or in part* from the [railroad's] negligence." *Id.* § 51 (emphasis added). In *Rogers*, this Court considered the meaning of the phrase "in whole or in part." This language, it held, rejected a construction of proximate cause that would require a plaintiff to prove that the railroad's negligence was the "sole, efficient, producing cause of injury." 352 U.S. at 506. "Sole proximate cause" was at the time a contentious formulation of proximate causation. In rejecting that formulation, the Court explained, where multiple causes are at issue, a plaintiff need only establish "that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." *Id.* (emphasis added).

B. Factual Background

Respondent Jordan was a conductor at Norfolk Southern. Pet. App. 2a. As part of his duties, he would take Train 17A from Sheffield Yard in Muscle Shoals, Alabama to the Memphis, Tennessee railroad yard, spend the evening in Memphis, and then return the train to Sheffield the following day. In addition,

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[2] FELA also departs from the common law by "abolish[ing] the fellow servant rule . . ., prohibit[ing] employers from contracting around the Act, and abolish[ing] the assumption of risk defense." *Sorrell*, 549 U.S. at 168.

upon arrival in Memphis, he would help separate the engine from the railcars and then work with the engineer to "run around" the cars on an adjacent track so that they could recouple the engines to the train on the other end of the train. *Id.*

On the night of November 13, 2002, Jordan completed his customary delivery of Train 17A from Sheffield to Memphis. Pet. App. 2a. After passing through Norfolk Southern's Memphis railroad yard, Train 17A reached a stretch of Memphis track called "Broadway," which begins approximately one mile west of the railroad yard. *Id.* Broadway consists of six tracks alongside each other, each owned by different railroad companies. *Id.* The clearances between those tracks are known to be particularly close. *Id.* at 7a. Following a meeting with the engineer, Jordan began to assist in separating the engines from the railcars. *Id.* at 2a. While working, Jordan was struck by an oncoming train operated by the Burlington Northern Santa Fe Railroad Company ("Burlington Northern"), which was travelling on the track immediately adjacent to Norfolk Southern's. *Id.* Evidence suggested that Jordan performed his task next to a track that allowed less reaction time, and at the time of the collision was not vigilantly watching for the easily visible lights of oncoming trains that, in plaintiff's words, are "extremely bright . . . kind of like the sun coming up." Trial Transcript, Jan. 30 – Feb. 2, 2006, *Jordan v. Burlington N. Santa Fe Ry.*, Case No. CT604175-03D2 (Tenn. Cir. Ct.), at 1106-07, 1518.

In addition, Norfolk Southern's engineer testified that the Burlington Northern train did not turn on its headlight until after the train hit Jordan. Pet. App. 6a-7a. (The engineer of Burlington Northern's train

testified that the headlight was illuminated prior to the accident. *Id.*) Evidence presented at trial established that the Memphis railroad yard is somewhat dark, despite the multiple overhead street lights and the fact that Jordan used a lantern while performing his tasks, and that it would be difficult to see an oncoming train at night if its headlights were off. Tr. at 957, 970, 1105-07, 1455-57.

C. Proceedings Below

1. Jordan brought suit under FELA, alleging that Norfolk Southern failed to provide him "a reasonably safe place to work," and also proceeded against Burlington Northern under Tennessee common law, alleging that Burlington Northern was negligent because the headlight of its train was not illuminated at the time of the collision. Pet. App. 3a. His sole allegation as to Norfolk Southern was that by allowing the tracks on Broadway to be so close together – a situation that has existed since before Norfolk Southern bought the portion of track at issue in 1898 – the railroad created an unsafe condition, which was permissible under state and federal regulatory law, but nonetheless ultimately led to his injuries. Tr. at 1480-81. At trial, Norfolk Southern offered evidence that Jordan was negligent for failing to monitor for oncoming trains, and that Burlington Northern was negligent because its locomotive was not using its headlight in the dark. Tr. at 1106-07, 1518; Pet. App. 6a-7a.

Following trial, Norfolk Southern requested an instruction that Jordan had the burden of proving that Norfolk Southern proximately caused his injuries, and objected to the court's draft instructions on the grounds that its ambiguous use of the phrase "even the slightest" could lead the jury to impose an

erroneous burden of proof. The court rejected Norfolk Southern's requested instruction and, instead instructed the jury that FELA "imposes liability on the railroad employer . . . when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence, *even the slightest*, on the part of the employer." Pet. App. 69a-70a (emphasis added). This contrasted with the court's instruction to the jury on Jordan's common law negligence claim against Burlington Northern, which employed the traditional elements of negligence. Pet. App. 70a-71a.

Ultimately, the jury returned a verdict of $5 million against Norfolk Southern, which the court reduced to $4 million dollars, the amount specified in Jordan's *ad damnum* request. Pet. App. 65a-66a. The jury found no negligence on the part of Jordan or Burlington Northern. *Id.* Norfolk Southern moved for a new trial based on (among other things) the jury instructions, which the court denied. *Id.* at 9a.

2. The Tennessee Court of Appeals affirmed the judgment. Pet. App. 1a-63a. Relevant here, Norfolk Southern reiterated its argument that the jury had been improperly instructed – specifically, that the "even the slightest" language permitted the jury to find Norfolk Southern liable under a "slightest cause" or "slightest negligence" standard. Relying on its pre-*Sorrell* precedent, the court held that the instructions adequately required the plaintiff to prove that Norfolk Southern's negligence was the "legal cause" of the plaintiff's injuries. *Id.* at 29a-30a. It recognized the "split of authority" over the proper standard of causation under FELA, but held that even if the instructions did reduce Jordan's evidentiary burden, *Rogers*' use of the phrase "even

the slightest" justified its continued use in jury instructions. *Id.* at 32a, 35a-36a.[3]

3. Norfolk Southern sought permission to appeal in the Supreme Court of Tennessee. That application was denied without comment. Pet. App. 67a-68a.

REASONS FOR GRANTING THE PETITION

This case is emblematic of the confusion and inconsistency engendered in FELA cases throughout the country by the misuse of the phrase "even the slightest." This petition squarely presents the issue left unaddressed by *Sorrell*: namely, whether in an action under FELA, a plaintiff must prove that the defendant's negligence was the proximate cause of the plaintiff's injury, or instead need only show "slightest causation." See 549 U.S. at 171-72. Part and parcel of this confusion is whether the standard of care has been lessened to a rule of "slightest" negligence. In rejecting the clear instruction requested by Norfolk Southern in favor of an instruction using the "even the slightest" language to establish negligence, the court below replicated the error of other courts that have interpreted FELA to require only "relaxed" causation and negligence. This mistaken approach departs from better-reasoned authority of other lower courts – as well as binding

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[3] Norfolk Southern also argued on appeal that because the track clearance on Broadway was adequate as a matter of law under Tennessee law, *see* Tenn. Code Ann. § 65-6-205(d), Norfolk Southern had complied with the per se standard of care under the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106(a)(2), which therefore preempted Jordan's FELA claim. The court of appeals rejected this argument, concluding that a state railroad safety statute did not establish a per se standard of care under FRSA for purposes of preempting FELA claims. Pet. App. 23a.

precedents of this Court – explaining that FELA incorporated and employs traditional, common-law negligence standards. This Court should grant review to resolve this persistent decisional conflict.

I. THE DECISION BELOW WIDENS A CONFLICT AMONG NUMEROUS DECISIONS OF STATE AND FEDERAL COURTS.

A. Lower Courts Are Intractably Divided Over The Standard For Proving Causation In A Negligence Action Under FELA.

"[A]lthough common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis." *Consol. R. Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994); see also *Urie*, 337 U.S. at 174. In practice, this principle should be easy to apply: Unless language in FELA explicitly rejects or obviously conflicts with a traditional common-law standard, the common-law principle controls. *Sorrell*, 549 U.S. at 165-66. FELA does not expressly reject the common-law rule of proximate causation. On the contrary, "FELA said nothing . . . about the familiar proximate cause standard for claims either of a defendant-employer's negligence or a plaintiff-employee's contributory negligence." *Id.* at 174 (Souter, J., concurring).[4] Nonetheless, there exists an

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[4] *See also id.* at 173 (Souter, J., concurring) ("*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury.").

entrenched and acknowledged division over whether FELA eliminated the common-law requirement of proximate causation in cases brought under FELA. *Id.* at 173 n.* (Souter, J., concurring) (recognizing the split of authority); Pet. App. 35a (noting the "split of authority regarding the Supreme Court's use of the phrase 'even the slightest' in *Rogers*").

1. Consistent with the rule at common law, and with Justice Souter's concurring analysis in *Sorrell*, at least seven state supreme courts have held that plaintiffs under FELA must prove that their injuries were proximately caused, in whole or in part, by the defendant's negligence.

The Utah Supreme Court, for instance, recently relied on Justice Souter's concurrence in holding that plaintiffs seeking to recover under FELA must prove that employer negligence proximately caused the plaintiff's injuries. Noting the "extensive debate" over the significance of the phrase "even the slightest," the court concluded that "[w]hile one could certainly read the Supreme Court's language in *Rogers* to speak to the standard of causation under FELA, this is not the best reading of the case." *Raab* v. *Utah Ry.*,—P.3d—, 2009 WL 2971868, at *6-7 & nn.28-29 (Utah Sept. 18, 2009). It expressly rejected the argument that *Rogers* lowered a plaintiff's burden to prove proximate causation. *Id.* at *7. Rather, it explained, "there is no [ ] statutory support for reading *Rogers* as eliminating the requirement of proximate causation"; such a holding "would be contrary to the Supreme Court's approach to FELA." *Id.* at *7-8.

In *Marazzato* v. *Burlington Northern Railroad*, the Montana Supreme Court likewise held that a plaintiff proceeding under FELA "has the burden of proving

that defendant's negligence was the proximate cause in whole or in part of plaintiff's" injury. 817 P.2d 672, 675 (Mont. 1991) (internal quotation marks omitted). Like the Utah Supreme Court, *Marazzato* specifically rejected the argument that *Rogers* reduced the plaintiff's burden to prove proximate causation. *Id.* at 674. Instead, it concluded, *Rogers* dealt with the unrelated issues of multiple causation and contributory negligence. *Id.* The supreme courts of Iowa, Minnesota, Nebraska, Ohio, and West Virginia have reached the same conclusion: FELA plaintiffs must prove that employer negligence proximately caused their injuries.[5]

2. Courts in other jurisdictions, however, treat *Rogers* as having eliminated the common-law requirement of proximate causation in negligence actions under FELA. That is consistent with Justice Ginsburg's concurrence in *Sorrell*, see 549 U.S. at 180, and it is the approach of the court below, which instructed the jury that FELA "imposes liability on the railroad employer . . . when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence, even the slightest, on the part of the employer." Pet. App. 70a.

Similarly, the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits require a FELA plaintiff to show nothing more than that the railroad's negligence was the "slightest cause" of the employee's injuries. See *Johnson* v. *Cenac Towing*,

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[5] *See Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997); *Snipes* v. *Chi., Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992); *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991); *Brabeck* v. *Chi. & Nw. Ry.*, 117 N.W.2d 921, 923 (Minn. 1962); *Reed* v. *Pennsylvania R.R.*, 171 N.E.2d 718, 721 n.3 (Ohio 1961).

Inc., 544 F.3d 296, 302 & n.4 (5th Cir. 2008); *Coffey* v. *Ne. Ill. Regional Commuter R.R. (Metra)*, 479 F.3d 472, 476 (7th Cir. 2007); *Churchwell* v. *Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006); *Williams* v. *Long Island R.R.*, 196 F.3d 402, 406-07 (2d Cir. 1999); *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606-07 (10th Cir. 1997); *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993); *Little* v. *Nat'l R.R. Passenger*, 865 F.2d 1329 (D.C. Cir. 1988) (per curiam) (Table); *Page* v. *St. Louis Sw. Ry.*, 312 F.2d 84, 89-90 (5th Cir. 1963).

The same is true of state courts in Alabama, Florida, Mississippi, Missouri, South Carolina, Texas, and Washington, as well as in the District of Columbia. See *Montgomery* v. *CSX Transp.*, 656 S.E.2d 20, 26, 28 & n.6 (S.C. 2008); *Canadian Nat'l/Ill. Cent. R.R.* v. *Hall*, 953 So. 2d 1084, 1091 (Miss. 2007); *Glass* v. *Birmingham S. R.R.*, 905 So. 2d 789, 796 (Ala. 2004); *Keranen* v. *Nat'l R.R. Passenger Corp.*, 743 A.2d 703, 712 (D.C. 2000); *Seeberger* v. *Burlington N. R.R.*, 982 P.2d 1149, 1152 (Wash. 1999); *Maritime Overseas Corp.* v. *Ellis*, 971 S.W.2d 402, 406 (Tex. 1998); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So. 2d 11, 14-15 (Fla. 1972); *Wilmoth* v. *Chi., Rock Island & Pac. R.R.*, 486 S.W.2d 631, 634 (Mo. 1972).

In those jurisdictions, *Rogers* is seen to have "definitively abandoned" the practice of determining "liability under the FELA in terms of proximate causation," *Summers*, 132 F.3d at 606, and to have established that "'proximate cause' is not required to establish causation under FELA," *Ogelsby*, 6 F.3d at 609; see *Montgomery*, 656 S.E.2d at 28 & n.6 (adopting Justice Ginsburg's *Sorrell* analysis in affirming South Carolina's use of a "relaxed"

causation standard in negligence actions under FELA). To the extent these authorities are rooted in the statutory text at all, they depend upon FELA's "in whole or in part" language, which they say creates a "relaxed" causation standard. *E.g.*, *Williams*, 196 F.3d at 406. This is squarely at odds with the proper interpretation of that language, as Justice Souter's *Sorrell* concurrence explained. 549 U.S. at 174-75 (Souter, J., concurring).

3. This split of authority over FELA's causation standard exists along numerous dimensions. Not only has it persisted after *Sorrell*; it has deepened. See, *e.g.*, *Raab*, 2009 WL 2971868 at *6-7 (recognizing the division of authority); *Montgomery*, 656 S.E.2d at 28 & n.6 (same); *In re Global Santa Fe Corp.*, 275 S.W.3d 477, 489 n.79 (Tex. 2008). Furthermore, the standard for causation under this federal statute varies between courts within certain states, depending on whether a case is filed in state or federal court. Thus, the parties in a FELA case filed in state court in Salt Lake City will litigate under a different causation standard than a case filed in the federal district court down the street.[6] Similar divisions exist in federal district courts and state intermediate appellate courts in jurisdictions where there is no controlling authority.[7]

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[6] *Compare Raab*, 2009 WL 2971868, at *6-8, *with Summers*, 132 F.3d at 606. The same is true in at least Montana and Ohio. *Compare Marazzato*, 817 P.2d at 675 (Mont. 1991), *with Ogelsby*, 6 F.3d at 609 (9th Cir. 1993); *compare Reed*, 171 N.E.2d at 721 n.3 (Ohio 1961), *with Churchwell*, 444 F.3d at 907 (6th Cir. 2006).

[7] *Compare, e.g.*, *Dickerson* v. *Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 915 (E.D. Ark. 2006) (federal district court in the Eighth Circuit holding that proximate causation is required),

The breadth of the division underscores its significance. The standard of causation arises in every case brought under FELA, and these differences in jury instructions can be both outcome-determinative and can cause litigation to be needlessly prolonged. The inherent uncertainty over whether a plaintiff must prove proximate causation means that both sides can legitimately hope that they will receive a favorable instruction, which creates a perverse incentive to litigate at least until a decision is made by the court on the proper instruction.[8]

B. Lower Courts Are Further Divided Over The Standard For Proving Negligence Under FELA.

1. A closely related division of authority concerns the duty of care under FELA. See *Williams*, 196 F.3d at 406-07 (recognizing the conflict); *Montgomery*, 656 S.E.2d at 26, 28 & n.6 (same). Certain courts have applied the "slightest" language not only to the statute's standard of causation, but also to the

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with, e.g., Magelky v. *BNSF Ry.*, 491 F. Supp. 2d 882, 887 (D.N.D. 2007) (federal district court in the Eighth Circuit holding that proximate causation is not required). In state appellate courts, *compare also, e.g., Brooks* v. *Brennan*, 625 N.E.2d 1188, 1193 (Ill. App. Ct. 1994) (Illinois Fifth District Appellate Court holding that proximate causation is required), *with, e.g., Albin* v. *Ill. Cent. R.R. Co.*, 660 N.E.2d 994, 999 (Ill. App. Ct. 1995) (Illinois Fourth District Appellate Court holding that proximate causation is not required).

[8] The conflict's significance is further heightened by the fact that judicial interpretations of FELA also apply to cases brought under the Jones Act, 46 U.S.C. § 30104(a), the federal law governing liability for workplace injuries suffered by seamen. *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (the Jones Act "adopts the entire judicially developed doctrine of liability under [FELA]" (internal quotation marks omitted)).

fundamental negligence requirement itself, requiring FELA plaintiffs to prove only "slight" negligence. As the Second Circuit has explained:

> While some circuits have limited the application of the "in whole or in part" language to the element of causation and apply traditional standards to the duty of care owed, this Circuit has explicitly stated that it construes "the statute, in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation."

Williams, 196 F.3d at 406 (citation omitted) (quoting *Ulfik* v. *Metro-North Commuter R.R.*, 77 F.3d 54, 58 & n.1 (2d Cir. 1996)).

In addition to the Second Circuit, the Ninth Circuit and the Supreme Courts of Pennsylvania and Washington have held that a FELA plaintiff need only prove a minimal degree of negligence. See *Mullahon* v. *Union Pac. R.R.*, 64 F.3d 1358, 1364 (9th Cir. 1995); *Seeberger*, 982 P.2d at 1152; *Hileman* v. *Pittsburgh & Lake Erie R.R.*, 685 A.2d 994, 995-96 (Pa. 1996).

These authorities rely upon the "even the slightest" language from *Rogers* as the basis for applying a standard of "slightest" rather than ordinary negligence. See, e.g., *Seeberger*, 982 P.2d at 1152. Some also apply a broad interpretation of FELA's "remedial nature." *E.g.*, *Williams*, 196 F.3d at 406. As this Court explained in *Sorrell*, however, while FELA "was indeed enacted to benefit railroad employees," that purpose alone does not require the Court "to interpret every uncertainty in the Act in favor of employees." 549 U.S. at 171. On this point, in any event, there is no "uncertainty" to construe.

FELA's text does not suggest a standard of negligence that is in any way distinct from the common law.

2. In direct conflict, four federal courts of appeals and two state supreme courts have rejected the view that FELA creates a "relaxed" standard for negligence. In *Gautreaux* v. *Scurlock Marine, Inc.*, for example, the Fifth Circuit sitting en banc reversed an earlier precedent adopting a slight negligence standard in actions brought under FELA. 107 F.3d 331, 335-36 (5th Cir. 1997) (en banc). It explained that FELA imposes a negligence standard without caveat or equivocation; accordingly, "one must assume that Congress intended its words to mean what they ordinarily are taken to mean – a person is negligent if he or she fails to act as an ordinarily prudent person would act in similar circumstances." *Id.* at 338 (internal quotation marks omitted).

In *Montgomery*, the South Carolina Supreme Court reached this same conclusion. It noted the "federal circuit split as to whether the relaxed FELA standard applies only to causation, or applies to the fault prong of FELA negligence as well," and concluded that "federal law has not conclusively established a relaxed standard of negligence (i.e., duty/breach) in FELA cases." 656 S.E.2d at 26-28. While accepting the (erroneous) proposition that *Rogers* adopted a "relaxed" standard for causation, the court rejected the argument that *Rogers* suggested that anything other than ordinary negligence principles apply to actions brought under FELA.

In addition to the decisions of the Fifth Circuit and the South Carolina Supreme Court, the Third, Sixth and Seventh Circuits, along with the Louisiana Supreme Court, have expressly rejected the

argument that FELA enacts a relaxed standard of negligence. See *Coffey*, 479 F.3d at 476; *Van Gorder* v. *Grand Trunk W. R.R.*, 509 F.3d 265, 269 (6th Cir. 2007), *cert. denied*, 129 S. Ct. 489 (2008)[9]; *Fashauer* v. *N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995); *Vendetto* v. *Sonat Offshore Drilling Co.*, 725 So. 2d 474, 478 (La. 1999).

These courts recognize that, absent a clear directive to the contrary, ordinary negligence principles must govern actions under FELA. And as with causation, nothing in FELA's text remotely suggests a "relaxed" standard of negligence. This Court repeatedly has resisted attempts to transform FELA into a no-fault workers' compensation scheme, which such a reading effectively would accomplish. See *Gottshall*, 512 U.S. at 543 (FELA "does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.") (internal quotation marks omitted).

II. THE DECISION BELOW CONFLICTS WITH BINDING PRECEDENTS OF THIS COURT.

The trial court instructed the jury that FELA "imposes liability on the railroad employer . . . when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence, *even the slightest*, on the part of the employer." Pet. App. 70a (emphasis added). This instruction disregards numerous of this Court's precedents interpreting FELA, and misconstrues *Rogers*, which did not purport to overrule any of those precedents.

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[9] Had this case been tried in Tennessee federal rather than state court, therefore, it is plain that this instruction could not have been given.

1. This Court repeatedly has recognized that FELA plaintiffs must prove proximate causation. See, *e.g.*, *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944) (FELA plaintiffs must prove that "negligence was the proximate cause in whole or in part" of the employee's injury); accord *Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943) (a railroad's action is "'the proximate cause of an injury'" if it was "'the natural and probable consequence of the negligence'" and "'ought to have been foreseen in the light of the attending circumstances'." (quoting *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U.S. 469, 475 (1876))). The Act simply makes no mention of, let alone dispenses with, the "clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely." *Sorrell*, 549 U.S. at 173 (Souter, J., concurring). Because FELA does not expressly abrogate the common law rule of proximate causation, this Court has "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Id.* at 174 (Souter, J., concurring).

Perhaps the clearest example of this recognition appears in *Davis* v. *Wolfe*, 263 U.S. 239 (1923), which clearly articulated that proximate causation is the rule in negligence actions under FELA:

> [A]n employee cannot recover under [FELA] if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him[.]

263 U.S. at 243.[10] *Davis* both followed and preceded a long line of decisions recognizing that proximate cause is the test under FELA.[11] Neither *Davis* nor its progeny have been overruled.

There is no basis for interpreting *Rogers* as *sub silentio* reversing not only *Davis*, but nearly a half century's worth of FELA precedents requiring proof of proximate causation. *Rogers* addressed the separate issue of whether a plaintiff had the burden to show that the railroad's wrongful act was the "sole, efficient, producing cause of injury," a concept distinct from the common-law standard of proximate causation. 352 U.S. at 506. As Justice Souter explained in *Sorrell*, the statement in *Rogers* that a railroad is liable under FELA if its negligence "'played any part, even the slightest'" in producing the employee's injuries addressed only "the occasional multiplicity of causations." 549 U.S. at 175 (quoting *Rogers*, 352 U.S. at 506). It did nothing, however, to undermine "the necessary directness of cognizable

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[10] *Davis* was brought under the Safety Appliance Act ("SAA"), which employs the same causation standard as FELA. See *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434 (1949).

[11] *See, e.g.*, *Norfolk & W. Ry.*, 229 U.S. at 118-120; *St. Louis, Iron Mountain & S. Ry.*, 229 U.S. at 280; *Lang* v. *N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *Davis*, 263 U.S. at 243; *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 410-411 (1926); *St. Louis-S.F. Ry* v. *Mills*, 271 U.S. 344, 347 (1926); *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930); *Nw. Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934); *Swinson* v. *Chi., St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Brady*, 320 U.S. at 483; *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949); *Urie*, 337 U.S. at 177; *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949).

causation." *Id.*[12] Nor would there have been any basis for *Rogers* to say that FELA's "in whole or in part" language alleviates a plaintiff's burden to show proximate causation. Rather, it simply clarifies that a FELA injury can have more than one proximate cause. Accordingly, relying on the statutory provision making railroads liable for employee deaths or injuries that "result in whole or in part from the negligence" of the railroad, 45 U.S.C. § 51, *Rogers* rejected the former common law formulation of "sole proximate cause," as inconsistent with the statute's abolition of pure contributory negligence. See *id.* § 53; *Sorrell*, 549 U.S. at 175 (Souter, J., concurring).

This recognition, however, did not overturn a legacy of holdings concluding that a FELA plaintiff must prove that railroad "negligence was *the proximate cause* in whole or in part" of the employee's injury. *Tennant*, 321 U.S. at 32 (emphasis added). In fact, *Rogers* derived its "test of a jury case" from *Coray* v. *Southern Pacific Co.*, a case which explicitly stated that FELA requires plaintiffs to prove that railroad negligence was either "the sole or a contributory proximate cause" of the employee's injury. 335 U.S. 520, 523 (1949) (citing *Davis*, 263 U.S. at 243;

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[12] In the years following *Rogers*, this Court has stated in dicta that FELA adopts a "relaxed standard" of causation, *Gottshall*, 512 U.S. at 543, and that a FELA plaintiff "is not required to prove common-law proximate causation," *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969). Both statements are correct, to the extent they simply recognize FELA's rejection of the older common law conception of "sole proximate causation" addressed in *Rogers*. *See Sorrell*, 549 U.S. at 175 (Souter, J., concurring). But if they meant to suggest that *Rogers* abrogates the federal rule of proximate cause, such dicta would be contrary to FELA's text and could not support the extensive line of precedents affirming the rule's application under FELA.

Spokane & Inland Empire R.R. v. *Campbell*, 241 U.S. 497, 509-10 (1916)). *Rogers* did nothing to unsettle the well-established causation standard recognized in *Davis* – it only made clear that in cases where a jury could find both the employee's and the railroad's negligence to be legal causes of the injury, the claim against the railroad had to go to a jury even if the railroad's contribution to the injury was slight relative to the employee's.

2. The suggestion that FELA incorporates a relaxed "slight negligence" standard likewise conflicts with clear pronouncements from this Court. Whatever confusion *Rogers* may have created with regard to *causation*, this Court never has indicated that FELA's *negligence* is anything other than the traditional rule at common law. This Court's FELA jurisprudence has consistently judged negligence (i.e., a breach in the standard of care) by reference to "common law principles." *Urie*, 337 U.S. at 174 (internal quotation marks omitted). Common-law negligence long has been understood to constitute a failure to exercise the care required under the circumstances to protect others against an unreasonable risk of harm. See, *e.g.*, W. Page Keeton et al., *Prosser & Keeton on the Law of Torts*, § 31, at 169-70 (5th ed. 1984). Consistent with this common-law standard, this Court long ago established that FELA applies "the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54, 67 (1943); accord *Anderson* v. *Atchison*,

Topeka & Santa Fe Ry., 333 U.S. 821, 823 (1948) (per curiam).

The application of ordinary negligence principles under FELA was affirmed most recently in *Sorrell*, where this Court was explicit: "so far as negligence is concerned, that standard is the same – *ordinary prudence* – for both Employee and Railroad alike." 549 U.S. at 169 (emphasis added; internal quotation makrs omitted). Recognition of the common-law standard of "ordinary prudence" leaves no room for a "relaxed" standard of "slight negligence." Such a construction would be curious in light of this Court's repeated admonition that FELA did not create a no-fault regime of workers' compensation: "'[t]he basis of [] liability is [] negligence, not the fact that injuries occur.'" *Gottshall*, 512 U.S. at 543 (quoting *Ellis* v. *Union Pac. R.R.*, 329 U.S. 649, 653 (1947)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
APRIL 22, 2008 Session

[Filed January 15, 2009]

No. W2007-00436-COA-R3-CV

THOMAS DAVID JORDAN,

v.

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, A Corporation, and NORFOLK SOUTHERN RAILWAY COMPANY, A Corporation

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Direct Appeal from the Circuit Court for Shelby County
No. CT-004175-03 James F. Russell, Judge

OPINION

Alan E. Highers, P.J., W.S.

This is an appeal from a jury trial involving the Federal Employers' Liability Act. A railroad employee was struck by a passing train belonging to another railroad. The employee sued both railroads, bringing a FELA claim against the employer railroad, and a negligence claim against the other railroad. The jury returned a verdict in the employee's favor against the employer railroad, finding that the employer railroad was 100 percent at fault. The employee was awarded damages in the amount of $4 million. We affirm in part and reverse in part.

I. FACTS & PROCEDURAL HISTORY

Thomas David Jordan was an employee of Norfolk Southern Railway Company ("Norfolk Southern") for over thirty years. On November 13, 2002, Mr. Jordan was working as the conductor on a train traveling from Sheffield, Alabama to Memphis, Tennessee. The train arrived in South Memphis on a stretch of track called "Broadway." Broadway consists of six tracks running parallel alongside each other, but owned by several different railway companies. Mr. Jordan exited the Norfolk Southern train and began working on the ground uncoupling the Norfolk Southern train's locomotives from the lead car. Mr. Jordan was required to perform some of his duties between the Norfolk Southern track and an immediately adjacent track owned by Burlington Northern and Santa Fe Railway Company ("Burlington Northern"). At approximately 7:40 p.m., Mr. Jordan was struck by a passing Burlington Northern train, suffering major injuries.

Mr. Jordan brought suit against Norfolk Southern and Burlington Northern on July 28, 2003. Mr. Jordan sought damages in the amount of $2 million, but later the trial court allowed Mr. Jordan to increase his *ad damnum* clause to $4 million. Mr. Jordan brought suit against Norfolk Southern pursuant to the Federal Employers' Liability Act, 45 U.S.C.A. § 51.[1] He claimed that his injuries were

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[1] 45 U.S.C.A. § 51 provides, in relevant part:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect

caused by the negligence of Norfolk Southern's employees "or by reason of a defect or insufficiency due to the Defendant's negligence in its work practices, walk ways, safety practices, inspection practices, track clearance, operating practices, and trackage at the time and place where Plaintiff suffered his injuries." Mr. Jordan specifically claimed that Norfolk Southern failed to provide him a reasonably safe place to work by requiring him to work on the ground between the two tracks, despite knowledge that the width between the two tracks did not allow sufficient clearance for employees. Mr. Jordan's complaint also included a common law negligence claim against Burlington Northern. He alleged that Burlington Northern allowed its train crews to operate its train at unsafe speeds and without proper warnings to individuals working in the area, despite knowledge that there was not sufficient track clearance between the two tracks.

Burlington Northern filed a cross-claim against Norfolk Southern, contending that Norfolk Southern was contractually obligated to indemnify Burlington Northern for "any and all liability, costs, expenses or attorney's fees arising out of Plaintiff's claims against [Burlington Northern] . . . ." This cross-claim arose from a "Letter Agreement" between the parties, dated November 5, 1999, which provided for indemnification in specified circumstances. Norfolk Southern filed a cross-claim against Burlington Northern, contending that Burlington Northern must indemnify it pursuant to the Letter Agreement. Alternatively, Norfolk

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or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Southern argued that the Letter Agreement was not applicable to the accident in question.

Norfolk Southern and Burlington Northern both filed motions for summary judgment as to the cross-claims, contending that the other party was responsible for indemnification. On July 8, 2005, the trial court held a hearing on these motions, and on February 9, 2007, the court denied and dismissed the respective motions. The order of dismissal incorporated the court's oral ruling. The trial court concluded that "each party will be obligated under the terms of the agreement and the language . . . to defend its own self and pay its own damages and cost of defense as is contemplated according to this [agreement]. . . ."

Trial commenced on January 17, 2006. The jury heard testimony from twenty-three witnesses. Mr. Jordan testified, but he did not remember the accident due to amnesia. The last thing he remembered from the day of the accident was being called into work when he was at his home in Alabama. The next thing he remembered was being in the hospital's trauma center approximately eleven to twelve days later. Mr. Jordan had suffered a significant trauma to the back of his head, which resulted in a laceration to his scalp and loss of consciousness. Mr. Jordan also suffered fractures at three different levels of his spine, which required the removal of bone from his hip area to be fused to the vertebra, in addition to the insertion of a metal rod and screws. Mr. Jordan had a fracture of his left tibia and fibula, or shin bones. Two screws were inserted just below his left knee, and another two screws were inserted above his ankle. Mr. Jordan had a fracture of the left scapula, or shoulder blade. He had an open wound on his right upper thigh area and a minor fracture in the upper part of the femur

in the right hip. Mr. Jordan also suffered a lacerated spleen and collapsed lung. Mr. Jordan awoke with horizontal double vision, which his opthalmologist testified was due to abnormal eye alignment.

Upon his release from the hospital, Mr. Jordan relied on his wife to dress him, bathe him, and otherwise care for him. At trial, Mr. Jordan testified that he still had problems with his left ankle, lower leg, and knee, along with discomfort in his hips, lower back and shoulder. His orthopaedic surgeon testified that Mr. Jordan had developed traumatic arthritis from his injuries, and he would, more likely than not, need to undergo knee replacement surgery. The orthopaedic surgeon described the screws in Mr. Jordan's knee as "prominent," meaning one could touch the skin and feel the screws. He said the screws would be "very irritating" underneath the skin. Mr. Jordan said he takes Celebrex everyday in addition to six to eight Tylenol per day. Mr. Jordan's orthopaedic surgeon testified that Mr. Jordan would need to take an anti-inflammatory drug for his back pain indefinitely, along with possible epidural injections. Mr. Jordan testified that his vision was still slightly impaired, despite the addition of a prism into his glasses.

At the time of trial, Mr. Jordan had not returned to work. Norfolk Southern had contacted Mr. Jordan and invited him to apply for a different position with the railroad, but Mr. Jordan claimed that it was a "relief' position in which Mr. Jordan would only be working a few days per month. Norfolk Southern had reimbursed Mr. Jordan for the cost of taking computer classes at a local community college, but he had not yet obtained a degree or secured employment. An economist testified that Mr. Jordan's net income loss

to date totaled $183,456. The present value of his future lost wages was $471,176, and the present value of his lost health insurance benefits totaled $111,677. These figures regarding future losses were calculated based upon the assumption that Mr. Jordan could not return to work. The economist also estimated that Mr. Jordan's future medical costs would total $61,550. In summary, he calculated Mr. Jordan's total economic losses at $827,859.

The engineer who was working with Mr. Jordan on the Norfolk Southern train testified about the nature of the six-track area of Broadway and the duties Mr. Jordan was required to perform on the ground in order to uncouple the locomotives. The engineer testified that there is no signal communication at Broadway, and the different railroads do not communicate with one another, so there was no way for him or Mr. Jordan to know that the Burlington Northern train was approaching on the night of the accident. In addition, Mr. Jordan was required to wear ear plugs and safety goggles while performing his duties. The engineer testified that the stationary Norfolk Southern locomotive was noisy, but the approaching Burlington Northern locomotive would not have been as noisy if it was idling. The Burlington Northern engineer testified that his locomotive was likely in idle mode at the time of the accident. Witnesses also testified that it is very dark at Broadway at night, yet it was normal practice for a passing train to dim its headlight as a courtesy as it approached another train. The Burlington Northern engineer testified that on the night of the accident, he dimmed his train's headlight as it rounded the curve and he saw the Norfolk Southern train. The Norfolk Southern engineer testified that the Burlington Northern train did

not have its headlight turned on until after the accident.

The Norfolk Southern engineer testified that Mr. Jordan was required to be between the Norfolk Southern and Burlington Northern tracks in order [sic] perform some of his duties, and he described the track clearance between those tracks as "extremely close." He testified that when the Burlington Northern train stopped beside his train after the accident, he could reach his arm out the window of the Norfolk Southern locomotive and touch the Burlington Northern train. Another Norfolk Southern employee also testified that there was not sufficient clearance between the tracks at that particular location to safely perform the duties required of a conductor. He said trains could unexpectedly "be on you, you know, in a matter of seconds" because of a nearby curve in the track and the lack of communication with other railroads. The employee described one incident he experienced when working as a conductor on the ground at Broadway, stating, "a train eased up on me without me hearing it. And it was so close I had to squat down under the car in order to keep from getting hit." The employee testified that Norfolk Southern had instructed its employees to perform other on the ground duties, such as brake tests, at locations away from Broadway where there is wider track clearance.

The distance between the tracks, from centerline to centerline, in the area where Mr. Jordan was injured ranged from 12 feet, 5.125 inches to 12 feet, 8.625 inches.[2] Considering the width of the locomotives on

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[2] Tennessee Code Annotated section 65-6-205 provides,

the two tracks, the open space between the Burlington Northern train and the Norfolk Southern train, also called the "safe zone," was somewhere between 2 feet, 1.125 inches and 2 feet, 4.625 inches. However, the Norfolk Southern engineer testified that a train in motion would be rocking somewhat, which would lessen the clearance between the trains. The engineer stated that in his opinion, Mr. Jordan did not have sufficient room at that particular location of the track to perform the duties he was required to perform on the night of the accident.

Various other witnesses testified whose testimony need not be repeated here. At the close of the plaintiff's proof, Norfolk Southern moved the court to direct a verdict in its favor, claiming that because its tracks were in compliance with Tennessee Code Annotated section 65-6-205(d), it could not have been negligent, as a matter of law. Norfolk Southern contended that Mr. Jordan's claim under the Federal Employers' Liability Act was "preempted by the Tennessee clearance statutes since they are officially recognized by the [Federal Railroad Administration] as the appropriate standard." The trial court denied Norfolk Southern's motion. Norfolk Southern renewed the motion at the close of all the proof, but the motion was again denied.

(a) The minimum distance between the center lines of parallel standard gauge tracks shall be fourteen feet (14') except as provided in this section.

. . . .

(d) Tracks constructed prior to April 13, 1949, may be maintained at such clearance as was lawful at the time of construction.

The tracks at issue in this case were originally constructed in the 1800's.

The jury returned its verdict on February 9, 2006, finding no negligence on the part of Mr. Jordan or Burlington Northern, and apportioning each zero percent fault. The jury found that Norfolk Southern was negligent and one hundred percent at fault for Mr. Jordan's injuries. The jury awarded Mr. Jordan $5 million in damages, but in its order on the jury verdict, the trial court entered judgment against Norfolk Southern in the amount of $4 million in accordance with the *ad damnum* clause.

Norfolk Southern filed a motion for a new trial, which the court denied on January 31, 2007.

II. ISSUES PRESENTED

Norfolk Southern raises the following issues on appeal, which we slightly reword:

1. Whether the trial court erred in declining to direct a verdict in its favor because Mr. Jordan cannot recover as a matter of law under the Federal Employers' Liability Act due to Norfolk Southern's compliance with Tennessee Code Annotated section 65-6-205.
2. Whether the trial court erred in instructing the jury concerning causation.
3. Whether the jury award is excessive.
4. Whether the trial court erred in refusing to grant a new trial because the verdict reflected passion, prejudice, or caprice, and whether the trial court should have granted Norfolk Southern's motion for mistrial made during the course of the trial.
5. Whether the trial court erred in refusing to grant a new trial because the jury award is contrary to the weight of the evidence.

6. Whether the trial court erred as a matter of law in interpreting the Letter Agreement.

Burlington Northern also raises the issue of whether the trial court incorrectly interpreted the Letter Agreement.

III. DISCUSSION

A. Norfolk Southern's Motion for Directed Verdict

On appeal, Norfolk Southern argues that it was entitled to judgment as a matter of law because Mr. Jordan cannot recover under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, when Norfolk Southern complied with the applicable state standard for track clearances, Tennessee Code Annotated section 65-6-205, and the state statute is a permissible "gap filler" in the Federal Railroad Safety Act. We begin with a brief discussion of the principles of preemption, then we will examine each of the federal Acts.

1. Preemption

Article VI of the United States Constitution provides that laws of the United States made pursuant to the authority of the Constitution "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The Supremacy Clause of Article VI provides Congress with the power to preempt state law. *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Id.* at 369. "Where a state statute conflicts with, or frustrates, federal law, the former must give way." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) (citations omitted). State laws that interfere with or are con-

trary to federal law are a nullity. *Ill. Cent. Gulf R.R. Co. v. Tenn. Pub. Serv. Comm'n*, 736 S.W.2d 112, 114 (Tenn. Ct. App. 1987) (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985)).

2. The Federal Employers' Liability Act

"The impetus for the [Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. §§ 51-60] was that throughout the 1870's, 80's, and 90's, thousands of railroad workers were being killed and tens of thousands were being maimed annually in what came to be increasingly seen as a national tragedy, if not a national scandal." *CSX Transp., Inc. v. Miller*, 159 Md.App. 123, 858 A.2d 1025, 1029 (Md. Ct. Spec. App. 2004). "In response to mounting concern about the number and severity of railroad employees' injuries, Congress in 1908 enacted FELA to provide a compensation scheme for railroad workplace injuries, pre-empting state tort remedies." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165, 127 S.Ct. 799, 166 L.Ed.2d 638 (2007) (citing *Second Employers' Liability Cases*, 223 U.S. 1, 53-55, 32 S.Ct. 169, 56 L.Ed. 327 (1912)). FELA was passed to extend statutory protection to railroad workers because of the high rate of injury to workers in that industry.[3] *Blackburn v. CSX Transp., Inc.*, No. M2006-01352-COA-R10-CV, 2008 WL 2278497, at *8 (Tenn. Ct. App. May 30, 2008); *Reed v. CSX Transp., Inc.*, No. M2004-02172-COA-R3-CV, 2006

[3] "The very title of the law, Federal Employers' Liability Act, is confusingly overbroad." *Miller*, 858 A.2d at 1029. It is not a "federal employer" law, but a federal law pertaining to railroads as employers. *Id.* "The only possible defendants are railroads engaged in interstate commerce. The only possible plaintiffs are the employees of those railroads who are injured on the job." *Id.*

WL 2771029, at *2 (Tenn. Ct. App. Sept. 26, 2006). "In adopting FELA, Congress created a remedy that 'shifted part of the human overhead of doing business from employees to their employers.'" *Pomeroy v. Ill. Cent. R.R. Co.*, No. W2004-01238-COA-R3-CV, 2005 WL 1217590, at *9 (Tenn. Ct. App. May 19, 2005) (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994)). Congress recognized that the railroad industry was better able to shoulder the cost of industrial injuries and deaths than were injured workers or their families. *Miller*, 858 A.2d at 131 (citing *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 431-32, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958)). "[FELA] was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Pomeroy*, 2005 WL 1217590, at *17 (quoting *Wilkerson v. McCarthey*, 336 U.S. 53, 68, 69 S.Ct. 413, 93 L.Ed. 497 (1949) (Douglas, J., concurring)). The Federal Employers' Liability Act provides, in relevant part:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C.A. § 51. The statute is broad and remedial, and it is to be liberally construed in order to accomplish the aforementioned purposes. *Blackburn*, 2008 WL 2278497, at *8; *Reed*, 2006 WL 2771029, at *2.

"Unlike a typical workers' compensation scheme, which provides relief without regard to fault, Section 1 of FELA provides a statutory cause of action sounding in negligence . . . ." *Sorrell*, 549 U.S. at 165. Under FELA, the railroad-employer's liability is premised upon its negligence. *Reed*, 2006 WL 2771029, at *2. In order to recover, an employee must show:

(1) that an injury occurred while the employee was working within the scope of his employment;

(2) that the employment was in the furtherance of the railroad's interstate transportation business;

(3) that the employer railroad was negligent; and

(4) that the employer's negligence played some part in causing the injury.

Id. (citing *Jennings v. Ill. Cent. R.R. Co.*, 993 S.W.2d 66, 69-70 (Tenn. Ct. App. 1998)). In this case, the question was whether Norfolk Southern was negligent in causing Mr. Jordan's injury. FELA does not define negligence. *Id.* When considering whether an employer was negligent under FELA, "courts are to analyze the elements necessary to establish a common law negligence claim." *Id.* (citing *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990); *Davis v. Burlington Northern, Inc.*, 541 F.2d 182 (8th Cir. 1976), *cert. denied*, 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed.2d 613 (1976)). The issue of negligence is to be determined "by the common law principles as established and applied in federal courts."[4] *Reed*, 2006 WL 2771029,

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[4] "FELA provides for concurrent jurisdiction of the state and federal courts, § 56, although substantively FELA actions are governed by federal law." *Sorrell*, 549 U.S. at 165-66 (citing

at *2 (citations omitted). Thus, the plaintiff must prove the traditional elements of negligence: duty, breach, foreseeability, and causation. *Id.* (citing *Robert v. Consol. Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987)). However, FELA deviated from the common law by abolishing the railroad's common law defenses of assumption of the risk, § 54, and it rejected contributory negligence in favor of comparative negligence, § 53. *Sorrell*, 549 U.S. at 166, 168. In FELA cases, an employee's negligence does not bar relief, but the employee's recovery is diminished in proportion to his fault. *Id.* at 166.

"Under FELA, the employer railroad has a duty to provide a reasonably safe workplace." *Reed*, 2006 WL 2771029, at *3 (citing *Bailey v. Cent. Vt. Ry.*, 319 U.S. 350, 352, 63 S. Ct. 1062, 1062, 87 L.Ed. 1444 (1943); *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996); *Adams*, 899 F.2d at 539). This does not mean that the railroad has the duty to eliminate all workplace dangers, but it does have the "duty of exercising reasonable care to that end." *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265, 269 (6th Cir. 2007) *cert. denied*, __U.S.__, 129 S.Ct. 489, 172 L.Ed.2d 356 (2008) (citing *Baltimore & Ohio S. W.R. Co. v. Carroll*, 280 U.S. 491, 496, 50 S.Ct. 182, 74 L.Ed. 566 (1930)). "A railroad breaches its duty to its employees when it fails to use ordinary care under the circumstances or fails to do what a reasonably prudent person would have done under the circumstances to make the working environment safe." *Id.* (citing *Tiller v. Atl. C.L.R. Co.*, 318 U.S. 54, 67, 63 S.Ct. 444, 87 L.Ed. 610 (1943); *Aparicio v. Norfolk &*

Chesapeake & Ohio R. Co. v. Stapleton, 279 U.S. 587, 590, 49 S.Ct. 442, 73 L.Ed. 861 (1929)); *see also Jennings v. Ill. Cent. R.R. Co.*, 993 S.W.2d 66, 70 (Tenn. Ct. App. 1998).

W. Ry., 84 F.3d 803, 811 (6th Cir. 1990)). In other words, "a railroad breaches its duty when it knew, or by the exercise of due care should have known that prevalent standards of conduct were inadequate to protect the plaintiff and similarly situated employees." *Id.* at 269-70 (internal quotations omitted).

3. The Federal Railroad Safety Act

In 1970, Congress adopted the Federal Railroad Safety Act ("FRSA") in order "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C.A. § 20101. FRSA is "the primary source of legislation dealing with the various railroad safety problems." *Emery v. S. Ry. Co.*, 866 S.W.2d 557, 561 (Tenn. Ct. App. 1993) (quoting *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991)). "The legislative history [of FRSA] indicates that Congress was wary of the role of the states in rail safety." *Id.* (quoting *Easterwood*, 933 F.2d at 1552-53). According to the House report, the committee feared that safety in the nation's railroads would not be sufficiently advanced by subjecting the national railroad system to varying degrees of enforcement in fifty states. *Id.* at 561-62 (quoting *Easterwood*, 933 F.2d at 1552-53). "Congress determined that the only way to effectively regulate railroad safety was to establish a broad national scheme of railroad safety regulation, as opposed to the then existing patchwork system of federal and state regulations." *Ill. Cent. Gulf R.R. Co. v. Tenn. Public Serv. Comm'n*, 736 S.W.2d 112, 115 (Tenn. Ct. App. 1987).

Under FRSA, the Secretary of Transportation is authorized to "prescribe regulations and issue orders for every area of railroad safety[.]" 49 U.S.C.A.

§ 20103(a). The Secretary of Transportation delegated that responsibility to the Federal Railroad Administration ("FRA"), which adopted "track safety standards" in 1971. *Ill. Cent. Gulf R.R. Co.*, 736 S.W.2d at 115 (citing C.F.R. §§ 213.1-.241(1985)). FRSA provides that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C.A. § 20106(a)(1). Thus, Congress expressly indicated an intent to preempt state law on the subject of railroad safety. *Ill. Cent. Gulf R.R. Co.*, 736 S.W.2d at 115. However, it made an exception for two particular situations. One exception, not at issue in this case,[6] allows a state to adopt or continue in force an additional or more stringent railroad safety standard when necessary to eliminate or reduce an essentially local safety hazard, under certain circumstances. 49 U.S.C.A. § 20106(a)(2). The second exception to FRSA preemption is stated as follows:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C.A. § 20106(a)(2). In other words, state rules, regulations, or orders related to railroad safety are

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[6] The parties do not claim that the second exception applies. A broad general regulation drawn for statewide application cannot come within the second exception because it is not drawn to address a local condition. *Ill. Cent. Gulf R.R. Co.*, 736 S.W.2d at 115.

not preempted if the Secretary of Transportation, or the FRA, has not adopted a rule or regulation covering the same subject matter. *Ill. Cent. Gulf R.R. Co.*, 736 S.W.2d at 115. In order to "cover" the same subject matter and preempt state law, the federal regulation must "substantially subsume the subject matter of the relevant state law," and not merely "touch upon" or "relate to" that subject matter. *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 352, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000).

If the FRA has adopted a rule or regulation that covers a subject, then any state "law, rule, regulation, order, or standard relating to railroad safety" that covers the same subject matter is preempted. 49 U.S.C.A. § 20106(a)(2). "Legal duties imposed on railroads by the common law fall within the scope of these broad phrases." *Easterwood*, 507 U.S. at 664. Thus, "state tort law would be pre-empted also, regardless of whether it is common law based or statutorily based." *Emery*, 866 S.W.2d at 560. For example, in *Emery*, a plaintiff whose automobile was struck by a train sued the railroad for negligence, claiming that the train was traveling at an excessive and dangerous rate of speed. *Id.* at 558. However, the Secretary of Transportation had promulgated regulations pursuant to FRSA concerning train speeds, and the train was operating in compliance with that speed limit. *Id.* at 560-61. The plaintiff's tort claim based on excessive speed was therefore preempted by FRSA. *Id.* at 561. In *Illinois Central Gulf Railroad Co.*, however, a Tennessee regulation regarding railroad walkways was not preempted because the FRA had not issued a regulation covering the same subject matter. 736 S.W.2d at 116.

Relevant to this case, Tennessee has a statute which addresses minimum track clearance, or the distance between railroad tracks, codified at Tennessee Code Annotated section 65-6-205. It provides:

> (a) The minimum distance between the center lines of parallel standard gauge tracks shall be fourteen feet (14') except as provided in this section.
>
> (b) The center line of any standard gauge ladder track, constructed parallel to any other adjacent track, shall have a clearance of not less than eighteen feet (18') from the center line of such other track.
>
> (c) The minimum distance between the center lines of parallel team, house and industry tracks shall be thirteen feet (13').
>
> (d) Tracks constructed prior to April 13, 1949, may be maintained at such clearance as was lawful at the time of construction.

Tenn. Code Ann. § 65-6-205.[6]

Even if we assume that Tennessee's track clearance statute and its "grandfather clause" are "related to railroad safety," it is undisputed that no FRA regulation addresses track clearance. Therefore, Tennessee's track clearance statute is not preempted by FRSA. *See* 49 U.S.C.A. § 20106(a)(2) ("A State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues

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[6] The distance between the tracks at issue in this case was approximately twelve and a half feet, but the tracks were constructed before 1949. Thus, Norfolk Southern was not in violation of the state statute.

an order covering the subject matter of the State requirement."); *Ill. Cent. Gulf R.R. Co.*, 736 S.W.2d at 115 (explaining that FRSA does not preempt state standards where the Secretary of Transportation has not adopted a rule or regulation covering the same subject matter).

4. FRSA and FELA

As previously discussed, a federal regulation adopted pursuant to FRSA preempts any *state* "law, rule, regulation, order or standard relating to railroad safety" that covers the same subject matter as the federal regulation. 49 U.S.C.A. § 20106(a)(2). This includes state tort claims. *Easterwood*, 507 U.S. at 664; *Emery*, 866 S.W.2d at 561. Some courts have extended the reasoning of the preemption analysis discussed above and held that *federal* negligence claims brought by railroad employees pursuant to FELA are "precluded" by FRSA regulations.

For example, in *Waymire v. Norfolk & Western Railway Co.*, 218 F.3d 773, 774 (7th Cir. 2000), a train was involved in an accident with a truck at a railroad crossing. One of the railroad's employees claimed he was injured and sued the railroad, alleging that it was negligent in allowing the train to travel at an unsafe speed and in failing to install additional warning devices at the railroad crossing. *Id.* However, the train was traveling well below the speed limit set by FRSA regulations, and the crossing was equipped with warning devices that were installed and approved in accordance with FRSA regulations. *Id.* The Seventh Circuit concluded that "in order to uphold FRSA's goal of uniformity," the employee's FELA negligence claims should be superseded by the FRSA regulations. *Id.* at 776. Other courts have similarly held that railroad employees' federal negligence

claims under FELA are precluded if the railroad complied with FRSA regulations. *See, e.g., Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 443-44 (5th Cir. 2001); *Dickerson v. Staten Trucking, Inc.*, 428 F.Supp.2d 909, 914 (E.D. Ark. 2006); *In re: Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala., on Sept. 22, 1993*, 188 F.Supp.2d 1341, 1348-49 (S.D. Ala. 2000); *Rice v. Cincinnati, New Orleans, & Pac. Ry. Co.*, 955 F.Supp. 739, 741 (E.D. Ky. 1997). Other courts have reached the opposite conclusion, holding that FELA claims are not preempted or precluded by FRSA regulations. *See, e.g., Earwood v. Norfolk S. Ry. Co.*, 845 F.Supp. 880, 885 (N.D. Ga. 1993) ("The Court concludes that Plaintiff's FELA claims are not precluded by FRSA. The two statutes do not purport to cover the same areas. . . . Neither the FRSA nor the regulations purport to define the standard of care with which railroads must act with regard to employees."); *Myers v. Ill. Cent R.R. Co.*, 323 Ill.App.3d 780, 257 Ill. Dec. 365, 753 N.E.2d 560, 565 (Ill. App. Ct. 2001) ("If Congress had intended FRSA to abolish FELA remedies for railroad employees, we believe Congress would have said so explicitly."). Thus, *Waymire's* holding that FELA negligence claims can be precluded when a railroad is in compliance with FRSA regulations is by no means universally adopted. *See* Joseph Mark Miller, *Federal Preemption & Preclusion: Why the Federal Railroad Safety Act Should Not Preclude the Federal Employer's Liability Act*, 51 Loy. L. Rev. 947 (Winter 2005) (discussing cases).

5. Norfolk Southern's Arguments

On appeal, Norfolk Southern argues that because the Tennessee track clearance statute is *not preempted* by FRSA, it effectively became a part of FRSA.

Norfolk Southern further argues that the Tennessee statute, as part of FRSA, established the standard of care for the railroad as a matter of law and precludes Mr. Jordan's FELA claim. We reject these arguments.

Norfolk Southern relies exclusively on *Tyrrell v. Norfolk Southern Railway Co.*, 248 F.3d 517 (6th Cir. 2001), for its argument that the Tennessee track clearance statute became part of FRSA. In that case, the Sixth Circuit was faced with an issue similar to the one before us. The plaintiff railroad employee was injured when he was walking between two tracks, and a railroad car traveling on one of the tracks struck him. *Id.* at 520. The employee sued the railroad for negligence under FELA, claiming that the railroad failed to provide a reasonably safe place to work by using an unreasonably dangerous track clearance in violation of state law. *Id.* Ohio's track clearance regulation required at least 14 feet of clearance between the centers of tracks, and the track clearance where the employee was injured was 13 feet, 9 inches, in violation of the regulation.[7] *Id.* The defendant railroad claimed that the state track clearance regulation was preempted. *Id.* The Sixth Circuit found, as we noted earlier in this opinion, that the "FRA has no rail safety regulation that substantially subsumes the subject of track clearances," therefore, the Ohio track clearance regulation was not preempted. *Id.* at 525. In closing, the Court reiterated that because no FRA regulation covered the subject matter of track clearance, the Ohio regulation was "a permissible gap filler in the federal rail safety scheme," citing 49 U.S.C.A. § 20106. *Id.*

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[7] Here, Norfolk Southern was not in violation of the state statute regarding track clearance because of its "grandfather clause."

Norfolk Southern interprets the *Tyrrell* Court's statement to mean that a state regulation, if not preempted by a FRSA regulation, becomes "incorporated into the federal rail safety scheme as a permissible 'gap filler,'" and, as part of FRSA, the Tennessee statute precludes Mr. Jordan's FELA claim. We need not decide whether a FELA claim can be precluded by a FRSA regulation, because, in this case, there is no FRSA regulation at issue. We believe that Norfolk Southern's reading of *Tyrrell* goes too far. In *Tyrrell*, the Sixth Circuit simply found that the state regulation at issue was not preempted pursuant to 49 U.S.C.A. § 20106, which states, "A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement." Under FRSA, the Secretary of Transportation is authorized to "prescribe regulations and issue orders for every area of railroad safety[.]" 49 U.S.C.A. § 20103(a). Norfolk Southern has cited no authority for the notion that a state statute regarding railroad safety, if not preempted, becomes part of FRSA in the sense that the state statute is to be treated as if it were an actual FRSA regulation. This certainly would not serve FRSA's stated goal of achieving nationally uniform laws and regulations. *See* 49 U.S.C.A. § 20106(a)(1).

In *Johnson v. Union Pacific R.R. Co.*, No. 8:05CV373, 2007 WL 2914886, at *2 (D. Neb. Oct. 4, 2007), a defendant railroad similarly claimed that the plaintiff in a FELA case should be prohibited from arguing that the railroad's track clearance was "too

close" because the railroad was in compliance with all Nebraska track clearance regulations. The Court noted that all the cases cited by the railroad in support of its position involved the preemptive force of regulations adopted pursuant to FRSA. *Id.* at *2. As is the case here, neither party had cited a case addressing whether state regulations can define the per se standard of care owed by a railroad under FELA. *Id.* The District Court ultimately concluded that "complying with the Nebraska track clearance regulations cannot be interpreted as setting the standard of care owed under the FELA," because the federal act superseded state law. *Id.* We agree with the District Court's reasoning.

In conclusion, we find that the trial court properly denied Norfolk Southern's motion for directed verdict, in which it argued that Mr. Jordan's FELA claim was precluded based on Norfolk Southern's compliance with the Tennessee statute.

B. Jury Instructions Regarding Causation

Next, Norfolk Southern argues that the jury instruction given by the trial court stated an incorrect causation standard. Norfolk Southern submitted the following Request for Instruction Number One regarding proximate causation:

> If you find that the railroad was negligent, you must next determine whether the railroad's negligence caused the plaintiff's injury in whole or in part. You need not find that the railroad's negligence was the sole cause, but you must find that it was a proximate cause of the plaintiff's injury. In order to find that it was a proximate cause, you must find that the injury was the natural and probable consequence of the railroad's negli-

> gence, and that the railroad's negligence was a substantial factor in bringing about the injury.
>
> You may not find that the railroad's negligence was a proximate cause if it merely created an incidental condition or situation in which an accident, otherwise caused, resulted in the plaintiff's injury.

The trial judge rejected the proposed instruction, stating, "in my humble view, the Defendant's Request Number One is adequately covered by the instructions that are given . . . ."

"Jury instructions must be correct and fair as a whole, although they do not have to be perfect in every detail." *Pomeroy*, 2005 WL 1217590, at *3 (citing *Wielgus v. Dover Indus.*, 39 S.W.3d 124, 131 (Tenn. Ct. App. 2001)). Jury instructions must be plain and understandable, and inform the jury of each applicable legal principle. *Id.* On appeal, we review jury instructions in their entirety and in context of the entire charge. *Id.* We will not invalidate a jury charge if, when read as a whole, it fairly defines the legal issues in the case and does not mislead the jury. *Hensley v. CSX Transp., Inc.*, No. E2007-00323-COA-R3-CV, 2008 WL 683755, at *2 (Tenn. Ct. App. Mar. 14, 2008) *perm. app. denied* (Tenn. Nov. 17, 2008). "The trial court should give requested special jury instructions when they are a correct statement of the law, embody the party's legal theory, and are supported by the proof." *Pomeroy*, 2005 WL 1217590, at *3 (citing *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 445 (Tenn. 1992)). "However, the trial court may decline to give a special instruction when the substance of the instruction is covered in the general charge." *Id.* We will not reverse the denial of a special request for an additional jury instruction

where the trial court fully and fairly charged the jury on the applicable law. *Id.*

The trial court's instructions to the jury were lengthy and detailed, exceeding twenty-five pages, but some of the most relevant instructions concerning this issue are as follows:

> It is the further theory and contention of the Plaintiff that both defendants were at fault and that their combined fault was the legal cause of the accident . . . .
>
> . . . .
>
> . . . [I]t is the theory and contention of each Defendant that if either of them should be at fault, which they deny, then the Plaintiff himself was at fault and that his fault was the sole, direct, proximate and legal cause of the accident . . . .
>
> . . . .
>
> . . . I will first give you instructions dealing with general principles of law that apply equally to all parties.
>
> . . . .
>
> A party is at fault if you find by a preponderance of the evidence that the party was negligent *and* that the negligence was a legal cause of the injury or damage for which a claim is made.
>
> Fault, as defined, has two parts: Negligence and legal cause. Negligence is the failure to use ordinary or reasonable care. . . . Negligence will not be inferred from the mere happening of an accident or occurrence of injury. . . .
>
> The second part of fault is legal cause. A legal cause of an injury is a cause which, in natural

and continuous sequence, produces the injury, and without which the injury would not have occurred.

An act or omission which fails to prevent injury is a legal cause of the injury. There may be more than one legal cause of an injury.

To be a legal cause of an injury, there is no requirement that it be the only cause, the last act, or the one nearest to the injury, so long as it is a factor in producing the injury or damage.

The foreseeability requirement does not require the person guilty of negligence foresee the exact manner in which the injury takes place or the exact person who would be injured. It is enough that the person guilty of negligence could foresee, or through the exercise of reasonable care should have foreseen, the general manner in which the injury or damage occurred.

If you find, by a preponderance of the evidence, that a party was negligent and that the negligence was a legal cause of the injury or damage for which a claim was made, you have found that party to be at fault. As I said before the plaintiff has the burden to prove fault on behalf of the defendants. . . .

LAW AS RELATES TO NORFOLK SOUTHERN RAILWAY COMPANY AS EMPLOYER OF THOMAS DAVID JORDAN, EMPLOYEE

. . . .

Please remember, all of my earlier instructions regarding fault of the parties including negligence and legal cause apply to this Defendant.

. . . .

. . . The rights, duties and obligations between plaintiff employee and employer Norfolk Southern Railway Company in this case are based upon a law of the United States commonly called the Federal Employers' Liability Act. This title does not mean that every employer is liable to every employee for every injury. . . .

. . . .

Section 1 of the Federal Employers' Liability Act as set forth in 45 U.S.C.A. § 51 . . . provides in part that: "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

. . . .

This is a negligence action. This means that before plaintiff can recover he must prove that his injury resulted in whole or in part from the negligence or fault of this defendant.

A railroad is not an insurer of the safety of its employees, and negligence on the part of the railroad may not be presumed or inferred from mere proof of the happening of an accident.

No liability may be imposed upon the railroad unless the evidence disclosed (1) that it failed to exercise reasonable care under the circumstances, and (2) that any such failure in whole or in part legally caused the injuries of the plaintiff. As I said before, the burden is upon the plaintiff

to prove both of the foregoing elements of his case by a preponderance of the evidence.

. . . [I]n order to recover plaintiff is required to prove by a preponderance of the evidence that the defendant through its agents, servants or employees was guilty of negligence, which, in whole or in part, legally caused the accident and injury. . . .

The [FELA] also provides that . . . [an] employee shall not be held to assume any risk of his employment in any case where such injury resulted in whole or in part from the negligence of the railroad. If you find that the Defendant, Norfolk Southern Railway Company was negligent and that such negligence was a legal cause of injury sustained by the Plaintiff, then even if the Plaintiff may have continued work though he knew of the unsafe nature of the dangers existing, Plaintiff is entitled to recover damages.

. . . .

The law under which plaintiff brings this action provides that defendant shall be liable for injury resulting "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbeds, works, . . . or other equipment." This statutory provision does not mean that the railroad employer is responsible for injury of an employee merely because it was caused by some defect or insufficiency of one of the items referred to. To the contrary, the statute imposes liability on the railroad employer only when the defect or insufficiency is due to negligence, even the slightest, on the part of the employer. If there is an injury as

> the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, even the slightest, on the part of the railroad.
>
> . . . .
>
> It was the continuing duty of the plaintiff to exercise reasonable and ordinary care for his own safety and protection. . . . If you find that he did not exercise such care as a reasonably prudent person would under like circumstances, and that such conduct contributed, in whole or in part, to the plaintiff's injury, then he is negligent.

On appeal, Norfolk Southern contends that FELA's standard of causation requires a plaintiff to prove that the railroad's negligence was "the proximate cause in whole or in part" of the employee's injury. Norfolk Southern claims that the trial court should have instructed the jury that in order for negligence to constitute a proximate cause of an injury, "it must appear that the injury was the natural and probable consequence of the negligence or wrongful act." We find that the substance of these proposed instructions was covered in the trial court's instructions. Although the trial court's jury instruction did not use the term "proximate" cause, the court repeatedly emphasized that the plaintiff must prove that the railroad's negligence "in whole or in part, legally caused" the injury. The trial court instructed the jury that "[a] legal cause of an injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred." The trial court in *Pomeroy v. Illinois Central Railroad Co.*, No. W2004-01238-COA-R3-CV, 2005 WL 1217590, at *2 (Tenn. Ct. App. May 19, 2005), also a FELA case, used this exact definition of legal cause in its jury

instructions, although it did not use the term "proximate" cause. On appeal, the railroad-employer argued that the trial court's jury instructions "failed to convey that Mr. Pomeroy could recover only if the jury found Illinois Central to be negligent and also found that such negligence proximately caused Mr. Pomeroy's injuries." *Id.* at *8. We rejected the railroad's argument, finding that the instructions "emphasized that Mr. Pomeroy bore the burden of proving that Illinois Central was negligent and that such negligence was the proximate cause of his injury." *Id.* at *9. We also stated that the jury instructions, as a whole,[8] were "clear, detailed, and accurate regarding the applicable law and theories of the parties in this case." *Id.* at *6.

Next, Norfolk Southern argues that the court should have instructed the jury that, under FELA, a railroad's conduct is not a proximate cause of an accident if it "merely created an incidental condition or situation in which the accident, otherwise caused, results in such injury." However, the trial court instructed the jury that "[a] railroad is not an insurer of the safety of its employees, and negligence on the part of the railroad may not be presumed or inferred from mere proof of the happening of an accident." The trial court also explained that a railroad is not responsible for an employee's injury "merely because it was caused by some defect or insufficiency" in the railroad's cars, engines, tracks, roadbeds, etc. "To the contrary," the court explained, "the statute imposes

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[8] The jury instructions in *Pomeroy* were nearly identical to those used in this case, and most of the paragraphs are exactly the same. The same trial judge presided in both cases, and in this case, the judge stated that he was using the same instructions he used in *Pomeroy*.

liability on the railroad employer only when the defect or insufficiency is due to negligence, even the slightest, on the part of the employer." The court further instructed the jury, "If there is an injury as the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, even the slightest, on the part of the railroad." On appeal, Norfolk Southern claims that the use of the phrase "even the slightest" was erroneous, citing a concurring opinion in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 127 S.Ct. 799, 166 L.Ed.2d 638 (2007). In *Sorrell*, the United States Supreme Court reviewed a Missouri pattern jury instruction that applied different standards of causation to railroad negligence and employee contributory negligence under FELA. *Id.* at 161. The jury was instructed to find an employee contributorily negligent if his negligence "directly contributed to cause" the injury, but the jury could find the railroad negligent if its negligence contributed "in whole or in part" to the injury. *Id.* The railroad objected to the instruction on the ground that it provided different standards of causation with respect to each party. *Id.* Regarding this issue, the Supreme Court held that "the causation standard under FELA should be the same for both categories of negligence." *Id.* at 160. Before the Supreme Court, the railroad "attempted to expand the question presented to encompass *what* the standard of causation under FELA should be, not simply whether the standard should be the same[.]" *Id.* at 163. The railroad claimed that there is a "deep conflict of authority" as to whether a "less onerous" proximate cause standard applies in FELA cases, based on the Supreme Court's prior statement in *Rogers v. Missouri Pacific Railroad*

Co., 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), that

> Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.[9]

Based on this split of authority, the railroad, in *Sorrell*, sought a ruling that "the standard should be proximate cause across the board." *Id.* at 165. Nevertheless, the majority of the Supreme Court declined to address the issue of "what standard applies as anterior to the question whether the standards may differ." *Id.* The Court limited its review to whether the court below erred in applying standards that differ. *Id.*

Two concurring opinions in *Sorrell* did address the issue of "what standard applies" to causation in FELA cases, but the authoring Justices disagreed as to the correct standard. Justice Souter's concurring opinion states,

> Despite some courts' views to the contrary, *Rogers* did not address, much less alter, existing law governing the degree of causation necessary for

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[9] The Supreme Court had subsequently characterized *Rogers* as establishing a "relaxed" causation standard in FELA cases:

> [W]e held in *Rogers* [ ] that a relaxed standard of causation applies under FELA. We stated that "[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) (citations omitted).

> redressing negligence as the cause of negligently inflicted harm . . . .
>
> Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely. . . .
>
> True, I would have to stipulate that clarity was not well served by the statement in *Rogers* that a case must go to a jury where "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." But that statement did not address and should not be read as affecting the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations. It spoke to apportioning liability among parties, each of whom was understood to have had some hand in causing damage directly enough to be what the law traditionally called a proximate cause.

Id. at 173-75 (footnote and citations omitted) (Souter, J., concurring). However, Justice Ginsburg disagreed with this reading of *Rogers*, stating in her concurrence that

> *Rogers* describes the test for proximate causation applicable in FELA suits. That test is whether "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."
>
> . . . .
>
> If we take up Prosser and Keeton's suggestion to substitute [the phrase] "legal cause" for "proximate cause," we can state more clearly what

> *Rogers* held: Whenever a railroad's negligence is the slightest cause of the plaintiffs injury, it is a legal cause, for which the railroad is properly held responsible.

Id. at 178-80 (footnote and citations omitted) (Ginsburg, J., concurring).

In this case, Norfolk Southern does not contend that the trial court applied different standards of causation to the parties,[10] which is the issue addressed by the majority in *Sorrell*. Norfolk Southern claims that the trial court gave an "incorrect causation standard" by instructing the jury that "the statute imposes liability on the railroad employer only when the defect or insufficiency is due to negligence, even the slightest, on the part of the employer," and further stating, "If there is an injury as the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, even the slightest, on the part of the railroad." In *Pomeroy*, 2005 WL 1217590, at *7-9, the trial court used this same jury instruction, and we held that the jury was properly instructed regarding causation. As stated above, there is a split of authority regarding the Supreme Court's use of the phrase

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[10] The jury was instructed to determine that Mr. Jordan was negligent if it found that he failed to exercise reasonable and ordinary care, and that conduct "contributed, in whole or in part, to [his] injury." The jury was also instructed that before Mr. Jordan could recover from Norfolk Southern, he was required to prove that his injury "resulted in whole or in part from the negligence or fault of [Norfolk Southern]." The trial court stated that its instruction regarding legal cause "appl[ied] equally to all parties."

"even the slightest" in *Rogers*,[11] and we decline to hold that the trial court's instruction was improper based upon one of two conflicting concurring opinions in *Sorrell*. Other courts considering the issue in light of the concurring opinions in *Sorrell* have reached the same result. *See, e.g., Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 656 S.E.2d 20, 28, n.6 (S.C. 2008) ("Although Justice Souter's concurring opinion in *Sorrell* has now clouded the issue on whether *Rogers* indeed relaxed the causation standard, the majority opinion did not speak to this precise issue. We therefore agree with Justice Ginsburg's assessment that *Sorrell* leaves both *Rogers* and *Gottshall* intact."); *CSX Transp., Inc. v. Begley*, No. 2007-CA-001380-MR, 2008 WL 3165840, at *3 (Ky. Ct. App. Aug. 8, 2008) ("CSX argues that the trial court erred by refusing to give the jury a proximate cause instruction. . . . In *Hamilton* [*v. CSX Transp., Inc.*, 208 S.W.3d 272, 278 (Ky. Ct. App. 2006)], a panel of this Court acknowledged that the United States Supreme Court's decision in *Rogers*, . . . "depart[ed]

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[11] The Sixth Circuit stated in *Tyree v. New York Central Railroad Co.*, 382 F.2d 524, 529 (6th Cir. 1967) *cert. denied*, 389 U.S. 1014, 88 S.Ct. 589, 19 L.Ed.2d 659 (1967),

> [I]t would be better in [FELA] cases if no mention of proximate cause whatever was made to the jury and, following the views of the Supreme Court as expressed in *Rogers v. Missouri Pacific R. Co.*, . . . that the jury be instructed on the subject of causation to the effect that if employer negligence played any part, even the slightest, in producing the injury, the employer is liable in damages, and that if the employee's negligence contributed in part to the injury, the negligence of the employer and employee be compared, and the amount of recovery be diminished in proportion to the amount of the employee's negligence. This would remove the troublesome phrase of proximate cause from [FELA] cases.

from traditional common-law tests of proximate causation." CSX urges us to revisit our decision in *Hamilton*, . . . pursuant to the concurring opinion in a recent United States Supreme Court decision, *Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158, 127 S.Ct. 799, 166 L.Ed.2d 638 (2007). However, we are not persuaded by CSX's reliance on the concurring opinion in *Sorrell*. Consequently, we decline to revisit *Hamilton*, and we conclude the trial court properly denied CSX's requested instruction on proximate causation."); *Medwig v. Long Island R.R.*, No. 06 Civ. 2568(FM), 2007 WL 1659201, at *3 (S.D.N.Y. June 6, 2007) ("[T]he concurring opinion clearly does not establish that a majority of the Justices would be willing to revisit—much less overturn—*Rogers* if the opportunity arose. Indeed, in her own concurrence, Justice Ginsburg concludes the opposite: that the majority opinion 'leaves in place precedent solidly establishing that the causation standard in FELA actions is more 'relaxed' than in tort litigation generally.' . . . There consequently is no reason for this court to conclude, as the [railroad] urges, that the legal principles applicable to a railroad worker's FELA claim have changed.").

Norfolk Southern points to one other substantive difference between the trial court's jury instruction and the one proposed by Norfolk Southern: Norfolk Southern's proposed instruction stated, "In order to find that it was a proximate cause, you must find . . . that the railroad's negligence was a substantial factor in bringing about the injury." The trial court's instruction did not include the "substantial factor" language. On appeal, Norfolk Southern cites one case in support of its proposed instruction's "substantial factor" language—*Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 120, n.8, 83 S.Ct. 659, 9 L.Ed.2d 618

(1963). *Gallick* was a FELA case involving a railroad employee who was bitten by an insect. *Id.* at 109. Along the railroad's roadbed, "there had been for many years a pool of stagnant water, in and about which were dead and decayed rats and pigeons, or portions thereof," and "[i]nsects had been seen on, over, and about this stagnant pool." *Id.* While the railroad employee was working near the pool, he experienced a bite on his left leg just above the knee. *Id.* The wound subsequently became infected, and the infection failed to respond to medical treatment. *Id.* It worsened progressively until it spread throughout the employee's body, eventually necessitating the amputation of both his legs. *Id.* A jury entered judgment for the employee, but an appellate court subsequently reversed, finding that the trial court should have entered a directed verdict for the employer. *Id.* at 112. Before the United States Supreme Court, the railroad argued that the injury was not reasonably foreseeable. *Id.* at 117. The Supreme Court rejected this argument, stating

> It is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts: assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable. And we have no doubt that under a statute where the tortfeasor is liable for death or injuries in producing which his "negligence played any part, even the slightest" *(Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493) such a tortfeasor must compensate his victim for even the improbable or unexpectedly severe consequences of his wrongful act.

Id. at 120-21 (citations omitted). In a footnote, the Court further explained, "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." *Id.* at 121, n.8 (citing Restatement, Torts, § 435). *Gallick* did not involve the "substantial factor" language in the context of a jury instruction, and we believe that Norfolk Southern's proposed jury instruction containing such language was erroneous and properly rejected by the trial court. In *Denton v. Southern Railway Co.*, 854 S.W.2d 885, 888 (Tenn. Ct. App. 1993), the trial court instructed the jury in a FELA case that the railroad was liable to its employee only to the extent that its negligence was a "substantial contributing factor" to the employee's injuries. The Court of Appeals held that this instruction constituted reversible error in light of the fact that, in FELA cases, "the employee's burden to prove causation is slight." *Id.* Similarly, in *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. Ct. App. 2006), a trial court submitted an interrogatory to the jury which asked whether the railroad was negligent, and if so, whether that negligence was "a substantial cause" of the employee's injuries. The Kentucky Court of Appeals held that this was "a fundamentally incorrect statement of the law of causation in FELA cases." *Id.* at 277; *see also Narusiewicz v. Burlington N. R.R. Co.*, 391 N.W.2d 895, 899 (Minn. Ct. App. 1986) ("The FELA standard dispenses with the 'substantial factor' requirement of proximate cause[.]"); *McKillip v. Union Pac. R.R. Co.*, 11 Wash.App. 829, 525 P.2d 842, 844 (Wash. Ct. App. 1974) ("The negligence of the employer need not be even a substantial cause of the ensuing injury."); *Snyder v. Chicago, Rock Island*

& Pac. R.R. Co., 521 S.W.2d 161, 165 (Mo. Ct. App. 1973) (stating that the rule in conventional negligence cases, that the conduct causing harm to another must be "a substantial factor" in bringing about the injury, does not apply in FELA cases); *Parker v. Atchison, Topeka & Santa Fe Ry. Co.*, 263 Cal.App.2d 675, 678, 70 Cal.Rptr. 8, 10 (Cal. Ct. App. 1968) ("The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury.").

Having reviewed the trial court's jury instruction in its entirety, we conclude that the court fully and fairly charged the jury on the applicable law. Thus, we find no error in the trial court's refusal to give Norfolk Southern's proposed jury instruction.

C. Was the Jury Verdict Excessive?

Next, Norfolk Southern contends that the trial court should have granted its motion for new trial because the jury verdict and the judgment entered on the verdict are excessive. Norfolk Southern notes that "the greatest figure offered by Plaintiff related to economic loss was $827,859," while Mr. Jordan points out that the ratio between his non-economic damages and economic loss was less than 4:1.

Federal law provides the standard for determining whether to grant a new trial in a FELA case tried in state court.[12] *Blackburn v. CSX Transp., Inc.*, No.

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[12] Although the Middle Section of this Court in *Blackburn* was specifically faced with the narrow issue of a challenge to the sufficiency of the evidence in the context of a motion for new trial, it noted that the United States Supreme Court cases it discussed stood for "a more expansive holding that goes well beyond our narrow issue," 2008 WL 2278497, at *11. The Court approvingly cited *Head v. CSX Transportation, Inc.*, 271 Ga. 670, 524 S.E.2d 215 (Ga. 1999), and *Seaboard System Railroad,*

M2006-01352-COA-R10-CV, 2008 WL 2278497, at *16 (Tenn. Ct. App. May 30, 2008). The United States Supreme Court has repeatedly emphasized "the preeminence of jury decisions in FELA matters and that any interference with a jury determination must be made pursuant to uniform federal laws." *Id.* at *11 (citing *Brady v. S. Ry. Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943), *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957)). Thus, in order to grant a new trial in a FELA case tried in state court, the trial court must apply the federal standard and find that the verdict is against the "clear weight" of the evidence. *Id.* at *16. The question of whether a jury verdict is excessive is "resolved by the discretionary consideration of the trial judge." *Cutter v. Cincinnati Union Terminal Co.*, 361 F.2d 637, 639 (6th Cir. 1966) (citing *Curdle v. Allied Chem. Corp.*, 309 F.2d 821, 826 (6th Cir. 1962); *S. Ry. Co. v. Miller*, 285 F.2d 202, 206 (6th Cir. 1960); *Consumers Power Co. v. Nash*, 164 F.2d 657, 660 (6th Cir. 1947)). "Absent clear abuse of discretion, appellate courts will not make their own appraisals." *Id.* (citing *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446 (8th Cir. 1961); *Agnew v.*

Inc. v. Taylor, 176 Ga.App. 847, 338 S.E.2d 23 (Ga. Ct. App. 1985), for the notion that federal law also governs the issue of whether a jury's award of damages is excessive in FELA cases. *See also Palmer v. Norfolk S. Ry. Co.*, No. 03A01-9309-CV-00313, 1994 WL 111037, at *5 (Tenn. Ct. App. E.S. Mar. 30, 1994) *perm. app. denied* (Tenn. Aug. 22, 1994) ("The measure of damages in suits under the FELA is determined by federal law."). The Middle Section's *Blackburn* opinion is thorough and well-reasoned, and we agree with the Court's conclusion that federal law provides the proper standard for determining whether to grant a new trial in a FELA case.

Cox, 254 F.2d 263, 268 (8th Cir. 1958); *Nat'l Alfalfa Dehydrating & Mill Co. v. Sorenson*, 220 F.2d 858, 861 (8th Cir. 1955); *Sebring Trucking v. White*, 187 F.2d 486 (6th Cir. 1951)). In a FELA case, a "verdict with judgment thereon generally will not be disturbed on grounds of excessiveness unless it clearly appears to be unsupported by the evidence." *Palmer v. Norfolk S. Ry. Co.*, No. 03A01-9309-CV-00313, 1994 WL 111037, at *5 (Tenn. Ct. App. E.S. Mar. 30, 1994) *perm. app. denied* (Tenn. Aug. 22, 1994) (citing *Knight v. Texaco, Inc.*, 786 F.2d 1296 (5th Cir. 1986); *Metcalf v. Atchison T. & S.F. Ry. Co.*, 491 F.2d 892 (10th Cir. 1974)). "[T]he issue of adequate compensation for personal injuries must involve more than a difference of opinion; but where the verdict is at variance with the dictates of experience and common sense, the court should not hesitate to say so." *Id.* (citing *Nairn v. Nat'l R.R. Passenger Corp.*, 837 F.2d 565 (2nd Cir. 1988); *Paturzo v. Metro-North Commuter R.R.*, 751 F.Supp. 1086 (S.D.N.Y. 1990); *Cunningham v. Penn. Ry. Co.*, 55 F.Supp. 1012 (D.C.N.Y. 1944)). "A court can overturn a jury verdict if it is so outrageous as to shock the conscience and there is no reasonable basis for its size." *Musleh v. Am. S.S. Co.*, 878 F.2d 382 (Table), 1989 WL 68028, at *3 (6th Cir. 1989) (citing *Rodgers v. Fisher Body Div., G.M.C.*, 739 F.2d 1102, 1106 (6th Cir. 1984)).

The *Palmer* Court held that the trial court should have granted the defendant railroad's motion for new trial when the jury awarded the plaintiff employee $275,000 for a knee injury. 1994 WL 111037, at *4. The Court described the award as "clearly excessive, even for FELA cases"[13] and said the award was

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[13] In *Miller*, the Maryland Court of Appeals extensively discussed the history and nature of FELA claims and noted that

"shocking to the conscience" for an "essentially mild injury." *Id.* The plaintiff in that case had twisted his knee, but he did not seek medical attention or miss work until eight months after the injury, when he underwent arthroscopic surgery. *Id.* The plaintiff's physician testified that there would be no further significant medical problems attributed to the knee injury, although the plaintiff may have "mild and occasional" pain. *Id.*

More recently, in *Pomeroy v. Illinois Cent. R.R. Co.*, No. W2004-01238-COA-R3-CV, 2005 WL 1217590, at *19 (Tenn. Ct. App. May 19, 2005), this Court addressed "the difficulty inherent in determining whether damages awarded largely in compensation for pain and suffering in an action brought under FELA are [excessive]." We explained that "[b]ecause pain and suffering are not easily quantified and do not lend themselves to easy valuations, . . . the determination of whether such an award is excessive is somewhat subjective." *Id.* (citing *Hand v. Norfolk So. Ry. Co.*, No. 03A01-9704-CV-00123, 1998 WL 281946, at *11 (Tenn. Ct. App. June 2, 1998) *perm. app. denied* (Tenn. Nov. 2, 1988)). In *Pomeroy*, the plaintiff employee suffered injuries to his back when he fell from a railcar that derailed. *Id.* at *1. The jury awarded him $500,000, although he only incurred $41,527 in special damages, including past and

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the "mode of legislation has created a friendly atmosphere toward injured railroad workers in the courts, both state and federal." 858 A.2d at 1032 (quoting Reginald Parker, "FELA or Uniform Compensation for All Workers," 18 *Law and Contemporary Problems* (Duke University School of Law; 1953) 208 n.3). "Verdicts are high, probably higher than they would be in ordinary tort suits for similar injuries." *Id.* Moreover, the rewards for a successful plaintiff are invariably higher than would be the case with a workers' compensation award." *Id.*

future lost wages and medical bills. *Id.* at *19. The employee did not undergo surgery and was able to return to work six weeks after the accident. *Id.* He was able to perform all daily activities, but due to his spinal injury, he continued to experience "unrelenting pain" on a daily basis and was unsure of whether he would be able to continue working until age 65. *Id.* Although we found the award "high," we were unable to say that the award was "excessive or unreasonable." *Id.*

On appeal, Norfolk Southern states in its brief that this Court "may take into account whether a particular award is excessive by comparing it to awards in other similar cases." It also urges us to consider "the particular injuries and their effects under the particular circumstances on the particular injured." Norfolk Southern then cites various cases in which jury verdicts have been declared excessive, however, none of the cases described by Norfolk Southern appear similar to the case at bar. Norfolk Southern cites one case involving a "concussion and minor injuries," another involving "compound fractures of foot," two involving leg amputations, one involving a "back injury," one involving "damage to ulnar nerve and cervical spine," another involving a torn arm muscle, and finally, a case involving wrist and knee injuries. In *Pomeroy*, we stated that, based upon our review of the broad range of actions for damages brought under FELA, "there is no objective standard for the award of damages for pain and suffering. They are, to use the vernacular, 'all over the place.'" *Id.* at *19.

In this case, Mr. Jordan suffered a significant trauma to the back of his head, a laceration to his scalp, loss of consciousness, amnesia, fractures at three different levels of his spine, which required the

removal of bone from his hip area to be fused to the vertebra, in addition to the insertion of a metal rod and screws, a fracture of his left tibia and fibula, which led to the insertion of two screws below his left knee and another two screws above his ankle, a fracture of the left shoulder blade, an open wound on his right upper thigh area and a minor fracture in the upper part of the femur in the right hip, a lacerated spleen, and a collapsed lung. Mr. Jordan awoke with horizontal double vision due to abnormal eye alignment and still suffered from slightly impaired vision at the time of trial, despite modified glasses. Mr. Jordan testified that he still had problems with his left ankle, lower leg, and knee, along with discomfort in his hips, lower back and shoulder. His orthopaedic surgeon testified that Mr. Jordan had developed traumatic arthritis because of his injuries, and he would, more likely than not, need to undergo knee replacement surgery. The orthopaedic surgeon described the screws in Mr. Jordan's knee as "prominent" and "very irritating" beneath the skin. Mr. Jordan said he takes Celebrex everyday in addition to six to eight Tylenol per day, and his orthopaedic surgeon testified that he would need to take an anti-inflammatory drug for his back pain indefinitely, along with possible epidural injections. Mr. Jordan submitted evidence of $827,859 in economic damages *excluding* the amount of his medical bills incurred prior to trial. We have considered Mr. Jordan's injuries and the effects of those injuries under the particular circumstances, as Norfolk Southern asked us to do, and we conclude that the $4 million judgment entered on the jury verdict is not excessive.

D. Motion for Mistrial and Passion, Prejudice, or Caprice on the Part of the Jury

Norfolk Southern presents several arguments on appeal regarding this issue. First, it addresses alleged "misconduct of counsel in argument." Norfolk Southern claims that where "prejudicial . . . remarks of counsel repeatedly enter the record, a new trial must be granted." Norfolk Southern cites specific statements made by counsel for Mr. Jordan during opening and closing arguments, which it contends were "inflammatory remarks." However, Norfolk Southern does not cite to anywhere in the record where it objected to these statements, and we find no such objection.

"The law is well-settled in this state that '[a]n objection to the remarks or conduct of counsel must be made at the trial and a ruling had thereon, or they will not be considered on appeal.'" *Ward v. Glover*, 206 S.W.3d 17, 39 (Tenn. Ct. App. 2006) (quoting *Lee v. Lee*, 719 S.W.2d 295, 299 (Tenn. Ct. App. 1986)). When counsel fails to object to remarks made in opening or closing statements, counsel shall be considered as having waived these issues on appeal. *Hill v. Simpson*, No. E2005-02401-COA-R3-CV, 2007 WL 2780376, at *4 (Tenn. Ct. App. Sept. 25, 2007) (citing Tenn. R. App. P. 36). In addition, Rule 3(e) of the Tennessee Rules of Appellate Procedure provides, in part:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, *misconduct of jurors, parties or counsel*, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a

> new trial; otherwise such issues will be treated as waived.[14]

(emphasis added). Norfolk Southern did not allege misconduct of counsel in its motion for new trial. At the hearing on the motion for new trial, counsel for Norfolk Southern mentioned one of the allegedly improper statements made by counsel for Mr. Jordan, and stated, "We did not cite as error the fact that Mr. Keith made that argument." Because Norfolk Southern did not raise this argument in the trial court, it cannot do so for the first time on appeal.

Next, Norfolk Southern claims that the trial court should have granted its motion for a mistrial based on the testimony of one of the witnesses, and because it did not, the jury relied on that improper testimony and entered its verdict based on passion or prejudice. Prior to the trial, the trial judge had considered the issue of whether evidence of prior accidents or incidents would be admissible. The judge had not ruled on the issue before trial because he determined that he needed to hear other proof in the case before he could determine whether the evidence of other accidents would be admissible. The judge apparently instructed the attorneys not to introduce evidence of prior accidents until he had an opportunity to consider the evidence and rule on the issue. At trial, Steve Rhodes, a long-time employee of Norfolk Southern and member of Norfolk Southern's Safety Committee, was called to testify. Mr. Rhodes was testifying about

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[14] However, "an issue regarding the propriety of statements made by opposing counsel during closing argument is waived if raised *for the first time* in a motion for new trial." *McCall v. Bennett*, 243 S.W.3d 570, 573 (Tenn. Ct. App. 2007) (emphasis added). Here, the issue was not raised during arguments or in the motion for new trial.

a committee meeting held in 2002, at which complaints were made regarding the track clearance at Broadway. Mr. Rhodes testified that the superintendent present at the meeting directed that the discussion of track clearance not appear in the minutes of the committee's meeting. The following exchange then took place, during direct examination by counsel for Mr. Jordan:

> Q. Mr. Rhodes, if you were so concerned about this area and you were making complaints about it, how come you let that happen?
>
> A. I shouldn't have, but we'd already had people get hurt in this area before, and I should have—
>
> Q. Hold on one second, Mr. Rhodes.

Counsel for Norfolk Southern then moved for a mistrial based upon the reference to prior accidents. Because it was late in the day, the trial judge dismissed the jury. In discussing the matter with the trial judge, the attorneys finally decided they would not introduce any evidence regarding prior accidents or incidents. The trial judge denied Norfolk Southern's motion for mistrial and decided to give a curative instruction to the jury. Norfolk Southern approved the substance of the following curative instruction, which was given when the trial resumed the following Monday:

> Before we get started, last Thursday at the end of the day you heard the witness make reference in his testimony to other accidents. I must tell you that there is no evidence before you regarding any other accident or accidents, plural, nor will there be any such evidence. You are instructed to disregard any such testimony and treat it as

> though you had never known it. Such testimony should not play any role in your deliberations, nor in your ultimate decision regarding this case.

Counsel for Norfolk Southern refused the trial judge's offer to poll the jury members regarding their oath and ability to try the case.

"It is well settled that the decision of whether to grant a motion for mistrial is within the sound discretion of the trial court." *Willis v. Settle*, 162 S.W.3d 169, 188 (Tenn. Ct. App. 2004) (citing *State v. McKinney*, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996)); *see also Hunter v. Ura*, 163 S.W.3d 686, 699 (Tenn. 2005). Absent an abuse of discretion, we will not disturb the trial court's decision to deny a motion for mistrial. *Willis*, 162 S.W.3d at 188; *DeLapp v. Pratt*, 152 S.W.3d 530, 539 (Tenn. Ct. App. 2004). "We should not reverse for 'abuse of discretion' a discretionary judgment of a Trial Court unless it affirmatively appears that the Trial Court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining." *McCullough v. Johnson City Emergency Physicians, P.C.*, 106 S.W.3d 36, 47-48 (Tenn. Ct. App. 2002) (citing *Marcus v. Marcus*, 993 S.W.2d 596 (Tenn. 1999)).

In this case, we find no abuse of discretion in the trial court's decision to deny the motion for mistrial. When the witness's statement is viewed in the context of the entire trial, it does not affirmatively appear to this Court that the statement caused an injustice or injury to Norfolk Southern. The witness did not even finish his sentence before counsel for Mr. Jordan stopped him. Counsel for Mr. Jordan explained that he had instructed all the witnesses not to mention prior accidents, and counsel's question to the witness did not appear to be designed to elicit a

response regarding prior accidents. The jurors were instructed to disregard the testimony, and Norfolk Southern declined to have the trial judge poll the jury. We find that any prejudice which may have resulted from the witness's testimony was cured by the trial court's adequate instruction to the jury.

Finally, Norfolk Southern briefly argues that Mr. Jordan's witnesses "gave opinions on the safety of the workplace in violation of the trial court's orders." Norfolk Southern does not cite to the record or any authority in support of this argument. We note that at one point, a witness who was describing Broadway said, "[the] tracks are too close together to work safely." The trial judge interrupted the witness and invited the lawyers to the bench. After a brief discussion, the judge instructed the jury as follows:

> Ladies and gentlemen, the issue of whether the area in question constituted a safe place to work will be up to you to decide. You should disregard the testimony of this or any witness who inadvertently expresses an opinion on that subject, and you should treat it as though you had never heard it.

We find no reversible error in the trial court's action.

E. Evidence to Support the Jury's Verdict

Next, Norfolk Southern argues that the trial court erred in refusing to grant its motion for a new trial because the jury award is contrary to the weight of the evidence. As previously discussed, in order to grant a new trial in a FELA case tried in state court, the trial court must apply the federal standard for considering the motion and find that the verdict is "against the clear weight of the evidence." *Blackburn*,

2008 WL 2278497, at *16. The *Blackburn* Court explained that the Tennessee standard and the federal standard for reviewing motions for new trial are not the same or even substantially similar. *Id.* at *7. In Tennessee, when a motion for new trial asserts that the jury's verdict is contrary to the weight of the evidence, it is the duty of the trial judge to weigh the evidence and determine whether it preponderates against the verdict, and if so, to grant a new trial. *James E. Strates Shows, Inc. v. Jakobik*, 554 S.W.2d 613, 615 (Tenn. 1977) (citing *Vaulx v. Tenn. Cent. R.R. Co.*, 120 Tenn. 316, 108 S.W. 1142 (1907)). The trial judge must be independently satisfied with the verdict rather than simply deferring to the jury's decision. *Holden v. Rannick*, 682 S.W.2d 903, 906 (Tenn. 1984). "Federal decisions, on the other hand, expressly disclaim the 'thirteenth juror' description." *Blackburn*, 2008 WL 2278497, at *16. Under the federal standard,

> A court may set aside a verdict and grant a new trial when it is of the opinion that the verdict is against the clear weight of the evidence; however, new trials are not to be granted on the grounds that the verdict was against the weight of the evidence unless that verdict was unreasonable. Thus, if a reasonable juror could reach the challenged verdict, a new trial is improper.

Id. at *6 (quoting *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 528-29 (6th Cir. 2005)). The trial judge should not set the verdict aside as against the weight of the evidence merely because, if he had acted as trier of fact, he would have reached a different result. *Id.* at *5 (citing 6A *Moore's Federal Practice* § 59.08[5] (1996)). He should "abstain from interfering with the verdict unless it is quite clear that the

jury has reached a seriously erroneous result." *Id.* at *6 (quoting 6A *Moore's Federal Practice* § 59.08[5] (1996)). The *Blackburn* Court summarized the distinction between the standards as follows:

> [A]t a very basic level, the standards are quite different since the Tennessee standard uses "preponderance" of the evidence, while the federal standard requires that the verdict be outweighed by the "clear" weight of the evidence. Under state law if a judge is "dissatisfied" with a jury verdict then the trial court is at liberty to order a new trial. Under the federal standard, the verdict must be unreasonable. Under state law a court must make an independent decision, while under federal law if a reasonable juror could have reached the verdict, the trial court is to defer. We believe that the differences between the standards are both apparent and significant.

Id. at *7.

On appeal, in FELA cases, "orders on new trial motions based on sufficiency of the evidence are reviewed on an abuse of discretion standard." *Id.* at *16 (citing *U.S. v. Blackwell*, 459 F.3d 737, 768 (6th Cir. 2006); *Tisdale*, 415 F.3d at 528; 11 Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 2819 (1995)). "A trial court abuses its discretion in its decision on a new trial if the court (a) relies on clearly erroneous findings of facts, (b) improperly applies the law, (c) uses an incorrect legal standard or (d) is otherwise 'clearly erroneous.'" *Id.* (citing *Blackwell*, 459 F.3d at 768).

In this case, the trial court's order on the motion for new trial is silent as to whether it used the Tennessee or federal standard for reviewing the

sufficiency of the evidence. However, at the hearing, the trial judge referred to his role as the thirteenth juror. The *Blackburn* Court was faced with the same situation, where the trial judge's statements at the hearing indicated that she used the Tennessee standard rather than the federal standard. *Id.* at *16. In *Blackburn*, however, the trial court had *granted* a new trial upon finding that the evidence preponderated against the jury's verdict. *Id.* The Court of Appeals granted the plaintiff's application for extraordinary appeal and concluded that the trial court erred in applying Tennessee's thirteenth juror standard. *Id.* at *1. The Court remanded for the trial court to consider whether the verdict was against the "clear weight" of the evidence under the harsher federal standard. *Id.* at *17. In this case, the trial judge denied the motion for new trial upon finding that the jury's verdict *was* supported by the preponderance of the evidence. Under the circumstances of this case, it is not necessary to remand the case for the trial judge to reconsider the motion under the federal standard. If the trial judge found that the evidence does not preponderate against the jury's verdict, then, by necessity, he found that the verdict is not against the clear weight of the evidence.

Next, we turn to an examination of the merits of Norfolk Southern's arguments on appeal regarding the sufficiency of the evidence. Norfolk Southern claims that it is inconsistent and against the clear weight of the evidence to find that Burlington Northern was not negligent and also find that Mr. Jordan was not negligent. At trial, conflicting testimony was presented regarding whether the headlight on the passing Burlington Northern train was turned on, turned off, or dimmed. The jury was asked, "Was the Defendant Burlington Northern Santa Fe Railroad Company

negligent under the Court's instructions: (a) by turning the headlight off? (b) by not engaging the bell or horn or both?" The jury answered "no" to both questions. On appeal, Norfolk Southern argues that the jury implicitly found that the Burlington Northern train's headlight must have been on.[15] Norfolk Southern then claims that if the headlight was on, that "necessarily means" that Mr. Jordan was negligent by stepping into the train's path. We disagree.

Even assuming *arguendo* that the jury did conclude that the headlight was on, that does not "necessarily mean" that Mr. Jordan was negligent. Mr. Jordan was performing the tasks necessary to uncouple the locomotives, which required him to be on the Norfolk Southern tracks. Witnesses testified that this area was called the "red zone" or "danger zone" because a person working on the tracks was in danger. The Norfolk Southern engineer explained that during the process of uncoupling the locomotives from the railcars, the train is unsecured and could roll. Therefore, the area off the tracks is considered the "safe zone." The engineer testified that at Broadway, the area between the different tracks that is supposed to be the "safe zone" is "just too tight." He was asked whether it was possible to work between the tracks at Broadway without "fouling the tracks," or crossing into the path of other trains, to which he responded, "If you were about two feet tall, you could." Another railroad employee testified that it was impossible to perform the duties of a conductor at Broadway without fouling the tracks.

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[15] We note that Norfolk Southern does not raise any issue challenging the verdict form.

Mr. Jordan testified that he had been taught to perform his duties with one foot inside the rail and one foot outside the rail because of the danger of cars rolling. The Norfolk Southern engineer testified that when working between the cars in that manner, an employee's vision of the track is blocked, and he or she cannot see what is coming down the track. The Burlington Northern engineer testified that he had dimmed the locomotive's headlight. In addition, Mr. Jordan was required to wear earplugs and safety goggles while working. Other railroad employees testified about how trains can sneak up on you at Broadway. The engineer of the Burlington Northern train testified that he was likely operating the train in its quieter idle mode at the time of the accident. The engineer said he briefly saw Mr. Jordan pivot out or raise up from between the cars just three to four seconds before he heard a thump, but he did not see Mr. Jordan take a step. The engineer said it happened so quickly that he did not have time to ring the bell or blow the whistle.

Under the federal standard, if a reasonable juror could reach the challenged verdict, a new trial is improper. *Blackburn*, 2008 WL 2278497, at *6 (quoting *Tisdale*, 415 F.3d at 528-29). Considering all the evidence, we cannot say that the trial court abused its discretion in denying Norfolk Southern's motion for new trial based on the sufficiency of the evidence.

F. The Letter Agreement

When Mr. Jordan was injured, he was uncoupling the Norfolk Southern train's locomotives from its railcars in preparation for the Norfolk Southern railcars to be interchanged with Burlington Northern. The Norfolk Southern yardmaster explained that

Norfolk Southern would generally deliver an interchange train downtown and "run the motors around it," then Burlington Northern would "come get it and pull it off to their railroad." However, the Burlington Northern train that struck Mr. Jordan was not involved in an interchange. It was en route to Missouri.

Norfolk Southern and Burlington Northern had entered into an agreement regarding their interchange operations on or about November 5, 1999. This "Letter Agreement" reads, in part:

> This follows conversations between local Burlington Northern and Santa Fe and Norfolk Southern Railway operating officers concerning use by The Burlington Northern and Santa Fe Railroad Company of Norfolk Southern Railway Company locomotives in performing interchange between [Norfolk Southern's] Forrest Yard and [Burlington Northern's] Tennessee Yard, both located in Memphis, Tennessee.
>
> [Norfolk Southern] is agreeable to granting such use of its locomotives in such interchange. The parties hereto agree that, in absence of a formal interchange agreement between [Burlington Northern] and [Norfolk Southern] for interchange in Memphis, Tennessee, they are willing to enter into this Letter Interchange Agreement for such interchange, subject to the following terms and conditions:
>
> . . . .
>
> *Section 1. Operating Plan [Norfolk Southern Delivery to Burlington Northern]*
>
> Upon arrival of inbound [Norfolk Southern] train carrying interchange traffic to [Burlington

Northern] in Memphis, Tennessee, [Norfolk Southern] inbound crew will deliver the train to [Burlington Northern] . . . and perform the following tasks to their train: . . . .

. . . .

Section 3. Interchange of Cars and [Norfolk Southern] locomotives

Interchange of rail cars and exchange of [Norfolk Southern] locomotives shall be accomplished simultaneously with completion of delivery . . . as defined in Sections 1 and 2 of this Letter Agreement. Said interchange, including [Norfolk Southern] locomotives, shall transfer to the account of the receiving carrier for purposes of determining liability . . . as hereinbelow defined. . . .

Section 4. Liability of Cars and [Norfolk Southern] Locomotives:

. . . .

(b) The responsibility of the parties hereto as between themselves for loss of, damage to and destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting from, arising out of, incidental to or occurring in connection with this agreement shall be determined as follows:

(1) Whenever any loss of, damage to or destruction of any property whatsoever or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever . . . occurs with the trains, locomotives, cars or equipment of, or in the account of, only one party hereto being involved, that party so involved shall assume all liability therefor and

bear all cost and expense in connection therewith, including without limitation all costs and expense for repairs to Interchange Trackage, and all costs and expense related to clearing of derailments, and shall forever protect, defend, indemnify and save harmless the other party . . . from and against any such liability, cost and expense.

(2) Whenever any such loss of, damage to or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever . . . occurs with the trains, locomotives, cars or equipment of, or in the account of, both parties being involved, each party shall separately assume and bear all liability, cost and expense for loss of or damage to said trains, locomotives, cars . . . and equipment operated by each of them and for injury to and death of each of their officers, agents and employees and persons in each of their care and custody, and the parties further agree that all liability, cost and expense for injury to and death of any other person or persons whomsoever, . . . shall be borne equally by the parties . . . . Whenever any liability, cost or expense is assumed by or apportioned to a party hereto under the foregoing provisions, that party (Party 1) shall forever protect, defend, indemnify and save harmless the other party . . . from and against that liability, cost and expense assumed by Party 1 or apportioned to Party 1.

(c) The foregoing provisions of paragraphs (a) and (b) of this Section 4 shall apply regardless of considerations of fault or negligence. . . .

. . . .

Section 5. Investigation

(a) Except as provided in Section 6(b) hereof, all claims, injuries, deaths, property damages, and losses arising out of or connected with this Letter Agreement shall be investigated, adjusted, and defended by the party bearing the liability, cost, and expense therefor under the provisions of this Letter Agreement.

. . . .

(d) All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit under this Letter Agreement shall be included as costs and expenses in applying the liability provisions set forth in this Letter Agreement . . . .

Thus, the critical issue is whether this injury occurred "with the trains, locomotives, cars or equipment of, or in the account of" one or both of the parties to the Letter Agreement "being involved."

The interpretation of a written agreements [sic] is a question of law, which we review de novo on the record, according no presumption of correctness to the trial court's conclusion. *Maggart v. Almany Realtors, Inc.*, 259 S.W.3d 700, 703 (Tenn. 2008) (citing *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); *Union Planters Nat'l Bank v. Am. Home Assurance Co.*, 865 S.W.2d 907, 912 (Tenn. Ct. App. 1993)). "The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles." *Id.* at 703-704 (quoting *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975)). "When resolving disputes concerning contract interpretation, our task is to ascertain

the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language." *Guiliano*, 995 S.W.2d at 95 (citing *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 333-34 (Tenn. 1983); *Bob Pearsall Motors, Inc.*, 521 S.W.2d at 580)). The entire contract should be considered in determining the meaning of any or all of its parts. *Maggart*, 259 S.W.3d at 704 (quoting *Cocke County Bd. of Highway Comm'rs v. Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985)). All of the contract provisions should be construed in harmony with each other, if possible, to promote consistency and avoid repugnancy between the various provisions of a single contract. *Guiliano*, 995 S.W.2d at 95 (citing *Rainey v. Stansell*, 836 S.W.2d 117, 118-19 (Tenn. Ct. App. 1992), *perm. app. denied* (Tenn. 1992)).

Norfolk Southern argues that Burlington Northern's train was the only one physically "involved" in the accident, because it was the train that caused the injury to Mr. Jordan. Accordingly, Norfolk Southern claims that Burlington Northern must assume all liability for the accident pursuant to paragraph (b)(1). Based on its reading of the contract, Norfolk Southern contends that Burlington Northern is liable for the entire portion of the judgment against Norfolk Southern, in addition to $332,584.81 for Norfolk Southern's attorneys' fees.

Burlington Northern insists that Norfolk Southern's train was "involved" in the accident because Mr. Jordan was working on the Norfolk Southern train when he was injured. Burlington Northern also points out that the Norfolk Southern train was the only train "involved" in interchange activity at the time of the accident, which is the subject of the Letter Agreement. Therefore, Burlington Northern contends

that, regardless of whether its train was also involved, Norfolk Southern was involved and must assume all liability for the accident pursuant to either paragraph (b)(1) or paragraph (b)(2). Burlington Northern also claims that Norfolk Southern is responsible for the legal fees Burlington Northern incurred in defending the claim in the amount of $312,062.10.

The trial court found that Mr. Jordan "was performing a task that is contemplated by the [Letter Agreement]. That is, he was . . . preparing a Norfolk Southern train for interchange to Tennessee Yard by a Burlington Northern crew." The trial court then concluded that the "trains of both parties [were] involved," pursuant to section 4(b)(2), so Norfolk Southern must assume all liability for the injury to its own employee. The court further held that each party would be responsible for its own legal expense.

We agree with the trial court's conclusion that this was an accident or loss contemplated by the Letter Agreement. Section (b) provides that it governs "[t]he responsibility of the parties hereto as between themselves for . . . injury to or death of any person or persons whomsoever resulting from, arising out of, incidental to or occurring in connection with this agreement." Mr. Jordan was performing the tasks required to prepare the Norfolk Southern train for the interchange when he was injured. Thus, his injury resulted from or arose out of the Letter Agreement, and section (b) applies to determine liability.

Next, we reject Norfolk Southern's contention that the Burlington Northern train was the only train "involved" because it was the only train that inflicted physical injury to Mr. Jordan. As stated above, we must determine the parties' intention by considering the entire contract. Section (b) broadly states that

"[t]he responsibility of the parties hereto as between themselves for loss of, damage to and destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting from, arising out of, incidental to or occurring in connection with this agreement shall be determined as follows. . . ." The subparagraphs of section (b) then address liability for "loss of, damage to or destruction of any property whatsoever or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever." Considering the entire agreement, we do not believe the parties intended the term "involved" to carry such a narrow construction. As Burlington Northern points out, if we were to accept Norfolk Southern's narrow definition of the term "involved," there would be a wide range of accidents for which neither party would be "involved." For example, if either party's employee fell on the tracks during an interchange, or was struck by a third party's train, neither of the parties to the Letter Agreement would be "involved" under Norfolk Southern's interpretation of the term. Norfolk Southern's strained definition of the term "involved" would frustrate the intention of the parties to contractually determine liability for losses "resulting from, arising out of, incidental to or occurring in connection with" the Letter Agreement.

For similar reasons, we also respectfully disagree with the trial court's conclusion that both parties were "involved," within the meaning of the Letter Agreement. If the term "involved" was viewed in isolation, we might agree that the injury occurred with both parties' trains being involved in the accident. However, we must consider the entire contract in determining the meaning of any or all of its parts. *See Maggart*, 259 S.W.3d at 704. The parties entered into the

Letter Agreement "for interchange in Memphis, Tennessee, . . . subject to the following terms and conditions . . . ." The Letter Agreement addressed the issue of which party would assume liability if "the trains, locomotives, cars or equipment of, or in the account of, only one party hereto [is] involved," and if both parties were involved. The Burlington Northern train that struck Mr. Jordan was not in any way involved in the interchange activity, which is the subject of the Letter Agreement, at the time of the accident. The Burlington Northern train was simply passing through Broadway on the way to Missouri when it struck Mr. Jordan. Given the purpose of the Letter Agreement, we do not believe the parties intended to define Burlington Northern's liability in general, for operations beyond its participation in this specific interchange. Therefore, we conclude that Burlington Northern has the more reasonable interpretation of the Letter Agreement, based upon the usual, natural, and ordinary meaning of the contractual language: the Letter Agreement allocates liability depending on whether one or both parties were involved in the interchange operation at the time of the injury. Norfolk's [sic] Southern's interpretations of the term "involved" ignore [sic] the purpose of the contract. The contract is to govern interchange operations, and the liability section spells out which party will be responsible for "injury to or death of any person or persons whomsoever resulting from, arising out of, incidental to or occurring in connection with this agreement." Burlington Northern's actions were in no way connected to the agreement.

In conclusion, we find that section 4(b)(1) applies and that the only party "involved" in interchange at the time of the injury was Norfolk Southern. Thus, pursuant to the Letter Agreement, Norfolk Southern

"shall assume all liability [for the injury] and bear all cost and expense in connection therewith . . . and shall forever protect, defend, indemnify and save harmless the other party . . . from and against any such liability, cost and expense." Section 5(a) provides that injuries and losses "arising out of or connected with this Letter Agreement shall be . . . defended by the party bearing the liability, cost, and expense therefor under the provisions of this Letter Agreement." Section 5(d) further provides, "All costs and expenses in connection with the . . . defense of any claim or suit under this Letter Agreement shall be included as costs and expenses in applying the liability provisions set forth in this Letter Agreement . . ." Therefore, we conclude that Norfolk Southern must indemnify Burlington Northern for its cost of defending against Mr. Jordan's claim.

IV. CONCLUSION

For the aforementioned reasons, we affirm the trial court's judgment entered on the jury verdict. We reverse the trial court's order dismissing Burlington Northern's cross-claim and remand for the entry of an order consistent with this opinion. Costs of this appeal are assessed against Norfolk Southern Railway Company, and its surety, for which execution may issue if necessary.

APPENDIX B

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

No. CT-004175-03
Division II

THOMAS DAVID JORDAN,
Plaintiff,

VS.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, a Corporation, and NORFOLK SOUTHERN RAILWAY COMPANY, a Corporation
Defendants.

JUDGMENT ON JURY VERDICT

THIS CAUSE CAME ON TO BE HEARD before the honorable James F. Russell, Judge of Division 2 of the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis upon the trial of the issues in this case before a duly empaneled jury consisting of:

Jeffrey Vernon
Michael Ramage
Quinton Shaver
Patrick McDevitt
Vanessa Walker
Cathy McGee
Sheila Goss
Marshawn Strickland

Mertis Walker
Robert Olson
David Levins
Lillie Whitelo

IT APPEARS THAT the jury, after due deliberation, found Defendant, Norfolk Southern Railway Company negligent for the injuries sustained by Plaintiff, Thomas David Jordan and found Defendant, Norfolk Southern Railway Company One Hundred (100%) Percent at fault for the injuries sustained by the Plaintiff, Thomas David Jordan; found Defendant, Burlington Northern Railway Company not negligent for the injuries sustained by Plaintiff, Thomas David Jordan and found Defendant, Burlington Northern Railway Company Zero (0%) Percent at fault for the injuries sustained by the Plaintiff, Thomas David Jordan; and found Plaintiff, Thomas David Jordan, not negligent for the injuries sustained by Plaintiff, Thomas David Jordan and found Plaintiff, Thomas David Jordan Zero (0%) Percent at fault for the injuries sustained by Plaintiff, Thomas David Jordan.

IT FURTHER APPEARS THAT the jury determined that Plaintiff, Thomas David Jordan, sustained damages in the amount of Five Million and No/100 ($5,000,000.00) Dollars.

IT FURTHER APPEARS THAT Plaintiff, Thomas David Jordan, sought an *ad damnum* of Four Million and No/100 ($4,000,000.00) Dollars.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, Thomas David Jordan, is hereby granted judgment against Defendant, Norfolk Southern Railway Company, in the amount of Four

Million and No/100 ($4,000,000.00) Dollars, for which let execution issue if necessary.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause is hereby dismissed as to Defendant, Burlington Northern Railway Company.

James F. Russell
[4/21/06]

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

Circuit Court for Shelby County
No. CT-004175-03

No. W2007-00436-SC-R11-CV

THOMAS DAVID JORDAN

v.

BURLINGTON NORTHERN SANTA FE
RAILROAD COMPANY, *et al.*

[Filed Aug 31, 2009]

ORDER

On April 3, 2009, the respondent, Thomas David Jordan, filed in this Court a motion for the admission pro hac vice of Robert M. Frey. Such motion was accompanied by an affidavit of Robert M. Frey pursuant to Rule 19 of the Rules of the Supreme Court. The affidavit states that Mr. Frey is in good standing and admitted to practice before the following courts: Mississippi Supreme Court; Texas Supreme Court; Northern and Southern Districts of Mississippi; Northern, Southern and Western Districts of Texas; and the U.S. Court of Appeals for the Fifth Circuit.

Upon due consideration, the Court deems that the motion is well-taken. It is hereby ORDERED that Robert M. Frey, is admitted pro hac vice to represent Thomas David Jordan in this proceeding.

Upon consideration of the application for permission to appeal of Norfolk Southern Railway Company and the record before us, the application is denied.

PER CURIAM

APPENDIX D

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS

[Dec. 20, 2007]

NO. CT-004175-03
DIV. II
JURY DEMAND

THOMAS DAVID JORDAN,
Plaintiff,

vs.

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, A corporation; and NORFOLK SOUTHERN RAILWAY COMPANY, A corporation,
Defendant.

JURY CHARGE

Ladies and Gentlemen of the Jury:

* * * *

DEFECT OR INSUFFICIENCY IN TRACKS OR EQUIPMENT

The law under which plaintiff brings this action provides that defendant shall be liable for injury resulting "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbeds, works, . . . or other equipment." This statutory provision does not mean

that the railroad employer is responsible for injury of an employee merely because it was caused by some defect or insufficiency of one of the items referred to. To the contrary, the statute imposes liability on the railroad employer only when the defect or insufficiency is due to negligence, even the slightest, on the part of the employer. If there is an injury as the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, even the slightest, on the part of the railroad.

* * * *

LAW AS RELATES TO BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY

I have previously instructed you upon the law as applies to Norfolk Southern Railway Company, as the employer of the plaintiff. I will now instruct you on the law as applies to the defendant Burlington Northern Santa Fe Railroad Company.

As I have explained before, the Plaintiff Thomas David Jordan is not an employee of Defendant Burlington Northern and Santa Fe Railway Company. As such, the Federal Employers' Liability Act has no application to Defendant Burlington Northern and Santa Fe Railway Company and Burlington Northern and Santa Fe Railway Company has no duty to provide plaintiff a reasonably safe place to work. The plaintiff's theory against Burlington Northern Santa Fe is under common law negligence.

A claim for negligence requires the following elements:

(1) a duty of care owed by the defendant to the plaintiff;

(2) conduct by the defendant falling below the standard of care amounting to a breach of that duty;

(3) an injury or loss;

(4) causation in fact; and

(5) proximate or legal cause.

If you find from the, greater weight or preponderance of the evidence that the headlight on the Burlington Northern train was not shining at all, as alleged, then you have found Burlington Northern was negligent.

Similarly, if you find from the greater weight or preponderance of the evidence under the circumstances then and there existing that Burlington Northern had a duty to engage either the bell, or horn, or both, by its failure to do so, then you have found that Burlington Northern was negligent.

In determining whether Burlington Northern was at fault, you must then proceed to determine whether any negligence that you may have found on the part of Burlington Northern was a legal cause of the accident in question. In doing so you must follow all of my earlier instructions regarding legal cause.

* * * *

APPENDIX E

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, SHELBY COUNTY

[Filed Feb. 8, 2006]

No: CT004175-03D2

THOMAS DAVID JORDAN,
Plaintiff,

Vs.

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, A corporation; and NORFOLK SOUTHERN RAILWAY COMPANY, a corporation,
Defendant.

DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S REQUEST FOR INSTRUCTION NO. 1

If you find that the railroad was negligent, you must next determine whether the railroad's negligence caused the plaintiff's injury in whole or in part. You need not find that the railroad's negligence was the sole cause, but you must find that it was a proximate cause of the plaintiff's injury. In order to find that it was a proximate cause, you must find that the injury was the natural and probable consequence of the railroad's negligence, and that the railroad's negligence was a substantial factor in bringing about the injury.

You may not find that the railroad's negligence was a proximate cause if it merely created an incidental condition or situation in which an accident, otherwise caused, resulted in the plaintiff's injury.

Davis v. Wolfe, 263 U.S. 239, 243 (1923); *Brady v. Southern Ry.*, 320 U.S. 476, 483 (1943); *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 120 n.8 (1963).

Denied,

/s/ James F. Russell
Feb. 8, 2006

A TRUE COPY ATTEST
JIMMY MOORE, Clerk

APPENDIX F

FEDERAL STATUTES

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

* * * *

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

No. 09-788

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THOMAS DAVID JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

BRIEF IN OPPOSITION

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March 8, 2010

QUESTIONS PRESENTED

1. Whether this Court should accept Norfolk Southern's invitation to use the case at bar as a vehicle to overturn *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500 (1957) (and every one of the federal circuits), and hold that FELA plaintiffs must prove, not the "relaxed" standard of causation acknowledged in *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994), but what Norfolk Southern calls "traditional" common law proximate cause, where (a) the jury instructions in the case at bar were, in substance, "traditional" common law proximate cause instructions; (b) at trial Norfolk Southern never contested the existence of causation if the jury found it negligent; and (c) the conflict among lower courts over *Rogers* that Norfolk Southern claims to see is not meaningful, and in any event does not require attention from this Court.

2. Whether this Court should accept Norfolk Southern's invitation to use the case at bar as a vehicle to examine cases reading *Rogers* as adopting a "relaxed" negligence standard, where (a) the jury instructions in the case at bar were "traditional" common law negligence instructions; and (b) Norfolk Southern failed to preserve its argument below.

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STATEMENT OF THE CASE

In railroad parlance, the space through which a train moves over a set of tracks is known, for obvious reasons, as the "red zone." 15 R. 627-29. The space outside the red zone is known, for equally-obvious reasons, as the "safety zone." *Id.* On a six-track stretch in South Memphis called Broadway, the safety zone is, according to stipulated measurements, no more than 28 and 5/8 inches, and may be as little as 25 and 1/8 inches. 18 R. 1072-74, 1080-81. Put another way, a man sitting in a Norfolk Southern locomotive on Broadway cannot stick his hand straight out the window if there is a locomotive on the adjacent Burlington Northern track—he must bend his elbow. 15 R. 651-52. These tracks were, presumably, wide enough when they were laid, over a century ago, when trains were narrower, but today they would be illegal under Tenn. Code Ann. § 65-6-205, save for the statute's grandfather clause, which allows them to be "maintained at such clearance as was lawful at the time of construction."

The safety zones on Broadway are so narrow that if Norfolk Southern directs an employee to work alongside a train stopped on Broadway, that employee will necessarily be working, at least in part, in Burlington Northern's red zone. As Norfolk Southern's attorney admitted to the Jury, "[t]here's no place you can stand without being, without filing [fouling—*i.e.*, entering the red zone of] the track, adjacent track[,] that's a fact." 16 R. 790.

Close clearances were not the only hazard on Broadway. Ordinarily a Norfolk Southern crewman

forced to work on the ground can count on being warned in advance, by radio, of trains approaching on the adjacent track. This was not so on Broadway, because the adjacent tracks were operated by different railroads that—despite the well-known dangers—never undertook steps to permit such communication. 15 R. 586-88; 17 R. 956-57; 17 R. 972; 21 R. 1623-24. Moreover, the lighting on Broadway was entirely inadequate. 17 R. 957; 15 R. 598; 17 R. 970.

Norfolk Southern employees, fearful of being struck by moving trains on adjacent tracks, complained. 17 R. 958-59; 18 R. 1100-02. Although Norfolk Southern attempted to suppress those complaints—after one Safety Committee meeting a supervisor requested that complaints about clearances be omitted from the minutes—it did admit that the area was "unsafe" (Norfolk Southern's term), and consequently forbade some on-ground work there. 16 R. 819-23 (re: minutes); 20 R. 1536-37 ("unsafe"); 17 R. 913-14 & Ex. 11 (no brake inspections allowed on Broadway); 20 R. 1536-37 & Ex. 101 (no hanging of End of Train devices allowed on Broadway); 15 R. 2023 (Norfolk Southern closing argument) (no brake tests on Broadway because "it'd be a whole lot safer" to do them elsewhere).[1]

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[1] One worker recalled working on the ground on Broadway when "a train eased up on me without me hearing it. And it was so close I had to squat down under the car in order to keep from getting hit." 17 R. 909 (emphasis supplied). Broadway was so dangerous that when a Norfolk Southern police officer refused to walk out there simply to close a container door, his boss, despite the obvious and immediate risk of pilferage, told him his refusal was justified. 21 R. 1573.

Norfolk Southern forbade some on-ground work at Broadway, but not all. Despite the fact that reasonable alternatives existed, Norfolk Southern ordered respondent Thomas David Jordan to Broadway, in the dark, 14 R. 548, where his job would require him to work at least partly in the red zone of the adjacent Burlington Northern track. As Norfolk Southern's attorney put it at trial, 25 R. 74, "of course, you have to fill [foul] the adjacent track, if you are going to pull the cut lever, which is part of what Mr. Jordan would have to do. . . ." Mr. Jordan never saw the Burlington Northern train that hit him, and left him with a career-ending, permanently-disabling roster of injuries that still give him pain daily.[2] He first learned about the accident from his wife, in the hospital, when he regained consciousness almost two weeks later. 18 R. 1110-11.

It was Mr. Jordan's theory of the case, not that the close clearances by themselves made Norfolk Southern liable, but that Norfolk Southern's failure to use due care in light of the close clearances, and other hazards, made Norfolk Southern liable.[3]

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[2] His injuries included three vertebrae fractures, 19 R. 1262, an open fracture of the left leg, 19 R. 1281, a fracture of the greater trochanter, 19 R. 1256, a fracture of the scapula, 19 R. 1276, severe head trauma, 19 R. 1314, an open gash to the upper right thigh, 19 R. 1256, and lacerations to the spine, hemothorax, and pneumothorax. 19 R. 1330.

[3] Norfolk Southern asserts that Mr. Jordan's "sole allegation as to Norfolk Southern" was that the tracks were too close together, Pet. 7, but in fact the FELA mandates a consideration of "the whole" of the railroad's conduct, which "may be greater

Norfolk Southern argued to the jury that Mr. Jordan — a thirty-year veteran whose former supervisor called him "a great employee" who "did a fine job, an excellent job," and whom Norfolk Southern selected to teach safety classes to other railroad workers, 21 R. 1599-1601, 1630 — was himself solely at fault.[4] According to Norfolk Southern's calculations, the Burlington Northern train was visible from the spot where Mr. Jordan was working for a full forty-three seconds before it hit him. 15 R. 2029-30. Under Norfolk Southern's theory of the case, Mr. Jordan, whose work at this point required him both to foul the Burlington Northern track and lean his head and upper body in between the cars of his own train, thus blocking his vision up and down the tracks, should have stopped working every few seconds to glance up and down the tracks; should have seen the Burlington Northern train approaching; and should have scrambled into the Norfolk Southern train's red zone. 15 R. 2030-39

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than the sum of its parts," *Union Pac. R.R. Co. v. Hadley*, 246 U.S. 330, 332 (1918) (Holmes, J.), and this FELA case was tried in conformity with that mandate. Mr. Jordan's Complaint alleged negligence generally, the evidence established a variety of inter-related acts of negligence, the instructions did not limit the jury to specific acts of negligence, and the form of the verdict asked simply "Was Defendant Norfolk Southern Railway Company negligent under the Court's instructions?"

[4] *See* Norfolk Southern's closing argument, 15 Tr. 2015 (Mr. Jordan "got careless one time"); *id.* at 2017 ("Norfolk Southern is not guilty of any negligence in this case"); *id.* at 2030-31 ("we claim that this accident . . . was caused solely by Mr. Jordan"); *id.* at 2031 (arguing that Mr. Jordan was negligent for having his back to the Burlington Northern train).

(Norfolk Southern closing argument) ("[I]f you're watching what you're doing you've got plenty of time to see traffic coming from other railroads. . . . Mr. Jordan wasn't even looking at a train, he had his back to the train. That's not due care, that's negligence. . . . if he had looked, he'd have seen this big old Burlington Northern Santa Fe train. . . He had 43 seconds from the time that train rounded that curve way back there, just past Mississippi Boulevard, to observe the train if he had looked").

Of particular note, Norfolk Southern did not argue in the trial court that its negligence, if any, was too remote to represent a legal cause and thus to support legal liability. While Mr. Jordan and Norfolk Southern each pointed at trial to the other as the cause of Mr. Jordan's injuries, Norfolk Southern neither argued nor presented evidence that if the jury found it negligent, the degree of its causation was less than traditional proximate cause. *See* 15 R. 2030-31 (Norfolk Southern closing argument) ("[W]e claim that this accident . . . was caused solely by Mr. Jordan"). The jury found that the cause alleged by Norfolk Southern—negligence on the part of Mr. Jordan—simply did not exist. In short, any difference between what Norfolk Southern calls "traditional common law proximate cause" and "relaxed" or "even the slightest" causation was simply never at issue at trial.

REASONS FOR DENYING THE WRIT

Although the question presented at the beginning of Norfolk Southern's petition is broad and nebulous, Pet. i, the body of the Petition presents two discrete questions, neither of which warrants this Court's reviewing the case at bar.

First, Norfolk Southern seeks review of the question whether the plaintiff in a FELA case "must prove that the defendant's negligence was the proximate cause of the plaintiff's injury, or instead need only show 'slightest causation.'" Pet. 9. This question is not presented by this case, because the trial court gave the jury, in substance, the very proximate cause instruction that Norfolk Southern seeks, and, in any event, causation was never seriously contested at trial. Moreover, Norfolk Southern's argument that the lower courts are "intractably divided" on the FELA causation standard does not support review. Although there is some disagreement on exactly what this Court meant in *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506 (1957), by the phrase "even the slightest," there is no conflict among the lower courts in practice: Norfolk Southern does not cite a single case in which the "relaxed" standard was rejected in favor of what Norfolk Southern calls "traditional common law proximate cause." Finally, Norfolk Southern is simply wrong on the merits. This Court's FELA decisions, pre and post *Rogers*, clearly manifest a "relaxed" causation standard.

Second, Norfolk Southern seeks review of the question whether a FELA plaintiff need "prove only

'slight' negligence" to prevail. Pet. 16. Again, there is no warrant for reviewing the case at bar. Norfolk Southern asserts that one instruction, by using the phrase "in the slightest," invited the jury to return a verdict against Norfolk Southern on proof of something less than traditional common law negligence, but in fact the instruction did not do so, and, in any event, Norfolk Southern failed to preserve the point.

I. THIS CASE PRESENTS AN INADEQUATE VEHICLE TO ADDRESS ANY CONFLICT AMONG THE LOWER COURTS REGARDING THE CAUSATION STANDARD IN FELA ACTIONS.

A. The Jury Instructions In Fact Required What Norfolk Southern Calls "Traditional" Common Law Proximate Cause.

Norfolk Southern asks this Court to grant certiorari to resolve a supposed conflict among the lower state and federal courts regarding the standard for proving causation in a FELA negligence action. Specifically, Norfolk Southern claims that some courts correctly insist that a FELA plaintiff prove "traditional, common-law" proximate causation, Pet. 10-12, while other courts, misled by *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500 (1957), require a plaintiff to prove only that the defendant's negligence was the "slightest" cause of the plaintiff's injury. Pet. 12-14.

Assuming *arguendo* that Norfolk Southern correctly describes the supposed conflict (*but see*

infra, at 17-22), this case presents an inadequate vehicle to address it. To begin with, the trial court's causation instruction was, in substance, a proximate cause instruction. Thus this Court's acceptance of Norfolk Southern's legal argument would not change the result below.

At trial Norfolk Southern requested what it calls a "traditional" common law proximate cause instruction, which would have told the jury that it could not return a verdict against Norfolk Southern without finding that its negligence "was a proximate cause of the plaintiff's injury":

> In order to find that it was a proximate cause, you must find that the injury was the natural and probable consequence of the railroad's negligence, and that the railroad's negligence was a substantial factor in bringing about the injury.

Pet. App. 72a. The trial court rejected the proposed instruction, not because of *Rogers,* but because the substance was adequately covered in the other instructions. *Id.* at 24a. Specifically, the causation instructions given by the trial court was as follows:

> A legal cause of an injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred.

Opp. App. 13a. The Court of Appeals agreed with the trial court that "the substance of these proposed instructions was covered in the trial court's instructions." Pet. App. 29a.

The Court of Appeals was correct. When the "lengthy and detailed" instructions (Pet. App. 25a) are read in full, as both jurors and judges are required to do, it is clear that the jury was told, again and again, that it could not rule for Mr. Jordan without finding "fault," which term was defined to include negligence and "legal cause," that is, "a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred." Pet. App. 25a-26a.

The Judge began by outlining the "theories and contentions of the parties." It was, he said, Mr. Jordan's "theory and contention" that "both defendants were at fault and that their combined fault was the legal cause of the accident," adding that each of the Defendants "denies . . . fault." Opp. App. 9a. The Judge then went on to give "instructions dealing with general principles of law that apply equally to all parties." *Id.* at 11a. The first thing he said in this section was that "the Plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: A. That the Defendants were at fault; [and] B. [damages]. The Defendants, as an affirmative defense, claim that Plaintiff was at fault." *Id.*

At this point, then, it was clear that Mr. Jordan could not recover against Norfolk Southern without proving "fault" on the part of Norfolk Southern. The Judge then zeroed in on "fault":

> Therefore, in deciding this case you must determine the fault, if any, of each of the parties. If you find that more than one of the parties are at fault, you will then compare the fault of the parties. To do this, you will need to know the definition of fault. A party is at fault if you find by a preponderance of the evidence that the party was negligent and that the negligence was a legal cause of the injury or damage for which a claim is made.

Id. at 12a.

"Fault," the Judge continued,

> has two parts: Negligence and *legal cause*. . . . The second part of fault is *legal cause*. A legal cause of an injury is *a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred*. . . . If you find, by a preponderance of the evidence, that a party was negligent and that the negligence was a legal cause of the injury or damage for which a claim was made, you have found that party to be at fault. As I said before the plaintiff has the burden to prove fault on behalf of the defendants. If the plaintiff fails to do so, you should find such defendant's fault to be zero.

Id. at 12a-14a (emphasis supplied). The instructions went on to mention the "fault" requirement again and again. *Id.* at 14a-16a.

In short, under the instructions given, the Jury could not return a verdict against Norfolk Southern without finding that Norfolk Southern was negligent, and that Mr. Jordan's accident was caused "in natural and continuous sequence" by that negligence. This language is identical to what Norfolk Southern calls "traditional common law" proximate cause, as confirmed by numerous cases[5]

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[5] *See, e.g., Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1043 n.4 (5th Cir. 1982) ("traditional common law proximate cause: the act or omission must be a cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of, and without which it would not have occurred") (internal quotation marks omitted); *Humphreys v. Delcourt*, 2009 WL 5174245, at *6 (Tex. App.-Houston [1 Dist.] Dec. 31, 2009) ("'Proximate cause' when used with respect to the conduct of [Humphreys] means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred"); *Marzoll v. Marine Harvest US, Inc.*, 2009 WL 4456321, at *35 (D. Me. Nov. 29, 2009) ("Proximate cause requires that the unseaworthy condition is the cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the results complained of, and without which it would not have occurred") (internal quotation marks omitted); *Grimes v. Norfolk S. Ry. Co.*, 116 F.Supp. 2d 995, 1005-06 (N.D. Ind. 2000) (Indiana common law) ("a chain of circumstances which in natural and continuous sequence lead to the resulting injury") (internal quotation marks omitted); *Anderson By and Through Anderson/Couvillon v. Neb. Dept. of Social Services*, 538 N.W.2d 732, 738 (Neb. 1995) ("a natural and probable result of the negligence"); *Comeau v. Rupp*, 810 F.Supp. 1172, 1177 (D.Kan. 1992) ("'Proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred, the injury being the natural and probable consequence of the wrongful act") (internal quotation marks

as well as legal treatises.[6] Norfolk Southern admitted as much when it held up, as a model of "the traditional elements of negligence," the functionally indistinguishable instructions given as

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omitted); *Cella v. U.S.*, 825 F. Supp. 1383, 1399 (N.D. Ind. 1991) ("traditional common law standard regarding proximate cause" is "the defendant's "act or omission must be a cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of, and without which it would not have occurred"); *Losey v. N. Am. Philips Consumer Elecs. Corp.*, 792 F.2d 58, 61 (6th Cir. 1986) ("a proximate cause is one which in a natural and continuous sequence unbroken by any new cause produces the injury either by itself or together with other negligence, or which may be described as negligence that is a substantial factor in causing the injury") (internal quotation marks omitted). *See generally Raab v. Utah Ry.*, 221 P.3d 219, 226 (Utah 2009) ("[i]n its most common usage, the term 'proximate cause' is equivalent to 'legal cause'") (citing Keeton, et al., *Prosser and Keeton on Torts* § 41, at 263 (5th ed. 1984)).

[6] *See, e.g.*, 1 Dan B. Dobbs, *The Law of Torts*, 453 (2001) ("With slight variations in the words, courts usually instruct juries or begin their own appellate discussions with a formal definition asserting that a proximate cause of an injury is one which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury."); 1 J.D. Lee & Barry Lindahl, *Modern Tort Law: Liability and Litigation* § 4.4 (2d ed. 2009) ("More recent cases also define proximate cause as any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred."); 57A Am. Jur. 2d *Negligence* § 411 ("One of the most widely quoted definitions is that the proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred") (footnotes omitted).

to Burlington Northern. Pet. 8; Pet. App. 70a-71a (incorporating, by reference, the previously given definition of "legal cause," and expressly equating it with "proximate cause").

There is no substantive difference between the instruction preferred by Norfolk Southern ("natural and probable consequence") and the one given to the jury below ("natural and continuous sequence"). Thus, the Court of Appeals was correct when, after careful analysis, it concluded:

> We find that the substance of these proposed instructions was covered in the trial court's instructions. Although the trial court's jury instruction did not use the term "proximate" cause, the court repeatedly emphasized that the plaintiff must prove that the railroad's negligence "in whole or in part, legally caused" the injury. The trial court instructed the jury that "[a] legal cause of an injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred."

Pet. App. 29a.

What Norfolk Southern is asking this Court to hold — in the case at bar, at least — is not merely that the FELA requires "traditional common law" proximate cause, but that it also mandates the use of the word "proximate" in the jury instructions.[7] The

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[7] Whatever differences there may be between the two concurring opinions in *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S.

petition, however, cites no legal authority for such a proposition.

To be sure, one portion of the instructions told the Jury that "even the slightest" negligence was sufficient. Norfolk Southern reads that instruction as referring to "even the slightest" causation, but this is a misreading. The instruction, reproduced and discussed below, p. 25, was a negligence instruction, not a causation instruction. What is more, even if it were a causation instruction, the case at bar is the kind of case that even Norfolk Southern agrees is subject to *Rogers*. In its brief on the merits in *Sorrell*, Norfolk Southern explained:

> *Rogers* held that, if there was evidence from which the jury could find that both the railroad's negligence and the employee's negligence were proximate causes of injury, the question of railroad liability must go to the jury even if it

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158 (2007), there is no reason to believe that there is any disagreement on this point:

> If the term "proximate cause" is confounding to jurists, it is even more bewildering to jurors. Nothing in today's opinion should encourage courts to use "proximate cause," or any term like it, in jury instructions. "[L]egal concepts such as 'proximate cause' and 'foreseeability' are best left to arguments between attorneys for consideration by judges or justices; they are not terms which are properly submitted to a lay jury, and when submitted can only serve to confuse jurors and distract them from deciding cases based on their merits."

Id. at 180 (Ginsburg, J., concurring) (citations omitted).

> played the slightest part in the injury—*i.e.*, if its causal contribution was slight relative to the employee's negligence.

Brief of Petitioner at 9, *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007) (No. 05-746).

The case at bar was such a case. There was "evidence from which the jury could find that both the railroad's negligence and the employee's negligence were proximate causes of injury." Thus under Norfolk Southern's own view of *Rogers*, "even the slightest" was the proper causation standard here.

B. Norfolk Southern Neither Argued Nor Presented Evidence Below that, if the Jury Found It Negligent, There Was Insufficient Evidence of Causation.

Not only did the trial court give the jury a proximate cause instruction, but causation was never seriously contested at trial. What the parties disputed was negligence. Norfolk Southern denied that it was negligent, and argued that Mr. Jordan was negligent. Mr. Jordan denied that he was negligent, and argued that Norfolk Southern was negligent. Based on the evidence presented at trial, the cause of the accident was the negligence of one or the other. Neither party argued, or introduced evidence showing, that if it were negligent, such negligence was nevertheless not the legal cause of the accident. If Norfolk Southern was negligent (and the Jury, which was entitled to so find, did so find), then even under the strictest and most exacting

causation standard, that negligence was the proximate cause of Mr. Jordan's accident. There was nothing marginal or remote about the connection between Norfolk Southern's failure to use due care in light of the close clearances, poor communication, and poor lighting, on the one hand, and the risk that Mr. Jordan, forced to work in the Burlington Northern red zone, unseeing and unwarned, would be hit by a Burlington Northern train.

The reporters are filled with FELA cases in which causation is truly at issue. Time and time again, for example, a train will be forced to stop because of, say, a defect in the brakes. A crewman will get out, and he will be injured. Assuming that the brake defect was due to railroad negligence, was that negligence the legal cause of the injury? *See, e.g., Richards v. Consol. Rail Corp.*, 330 F.3d 428, 437 n.5 (6th Cir. 2003) (answering yes, at least where injury takes place while crewman is discharging job-related responsibilities; speculating no if, for example, "an employee, who has exited the train and is standing next to it merely waiting for the brakes to be repaired, is attacked by a rabid dog. Or the same employee waiting for the defect to be repaired decides to stretch his or her legs, goes for a walk, falls, and is injured").

The *Richards* fact pattern presents itself over and over, as the many cases cited in *Richards* attest.[8]

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[8] Another is *Raab v. Utah Ry. Co.*, 221 P.3d 219, 231 (Utah 2009) (finding proximate cause where plaintiff, a crewman on a train that stopped due to a defective brake, exited the train and eventually got hurt outside the train).

Indeed, according to amicus American Railroad Association, there is a continuous flow of cases in which the distinction between "traditional common law proximate cause" and "relaxed" or "even the slightest" causation would be decisive. Thus, to the extent that the causation standard is otherwise certworthy, the Court should await a case where causation actually was disputed at trial, and where the only causation instruction given was a *Rogers*-based instruction.

II. THE CONFLICT AMONG THE LOWER COURTS CLAIMED BY NORFOLK SOUTHERN IS NEITHER INTRACTABLE NOR DEEP.

Attempting once again to obtain this Court's review of the causation standard in FELA cases, *see Sorrell*, 549 U.S. at 164 (rejecting Norfolk Southern's effort to "smuggle" the causation issue into the case after the grant of certiorari), Norfolk Southern claims that there exists an intractable, "entrenched and acknowledged" conflict among the lower courts on FELA causation. It argues that while some courts rightly insist on proof of "traditional, common-law" proximate cause, others "treat *Rogers* as having eliminated the common-law requirement of proximate causation. . . ." Pet. 10-12.

There is less here than meets the eye. It is true that there is some disagreement on the exact meaning of *Rogers*. The federal courts of appeal all seem to read *Rogers* as making, in effect, the same broad statement that this Court made in *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994), to wit, "a relaxed standard of causation applies under

FELA."[9] A handful of courts have read *Rogers* more narrowly. *See, e.g., Marazzato v. Burlington*

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[9] *Moody v. Me. Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987) ("We recognize the considerably relaxed standard of proof in FELA cases"); *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2nd Cir. 1999) ("a relaxed standard applies in FELA cases"); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3rd Cir. 1991) ("In *Rogers*, the Court held that 'the test of a [FELA] jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury .' .... Similarly, in *Gallick*, the Court stated that there can be a jury question of causation when there is 'evidence that *any* employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played *any* role in producing the harm'"); *Brown v. Baltimore & Ohio R.R. Co.*, 805 F.2d 1133, 1137 (4th Cir. 1986) (quoting *Rogers* as authority, for this most "lenient standard" of proof with respect to causation in an FELA action); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (unanimous, en banc) (Supreme Court had used the term "slightest" in *Rogers* "to describe the reduced standard of causation between the employer's negligence and the employee's injury" in FELA cases); *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 434 (6th Cir. 2003) (*Rogers* "adopted this relaxed [causation] standard in order to effectuate Congress' intent . . . 'to preserve the plaintiff's right to a jury trial'"); *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990) ("It is well established that the quantum of evidence required to establish liability in an FELA case is much less than in an ordinary negligence action"); *Nordgren v. Burlington N. R.R. Co.*, 101 F.3d 1246 (8th Cir. 1996) (relaxed standard for causation); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1363 (9th Cir. 1995) ("[t]he standard for receiving a jury trial is less stringent in FELA cases than in common law tort cases"); *Summers v. Mo. Pac. R.R. System*, 132 F.3d 599, 607 (10th Cir. 1997) (quoting *Rogers* at length and concluding: "A jury instruction containing both the statutory language and the explanatory language of *Rogers* is certainly the clearest articulation of the appropriate causation standard");

Northern R. Co., 249 Mont. 487, 491, 817 P.2d 672, 674 (1991) ("*Rogers* case was addressing the issues of multiple causes and contributory negligence after it had been established that the employer was negligent"); *Raab v. Utah Ry. Co.*, 221 P.3d 219, 228-30 (Utah 2009) (rejecting the argument that *Rogers* requires only "but for" causation; "[w]hile one could certainly read the Supreme Court's language in *Rogers* to speak to the standard of causation under FELA, this is not the best reading of the case"). And some, like the *Raab* court, misconceive what their sister courts have said about *Rogers*.[10]

Thibodeaux v. Tex. E. Transmission Corp., 548 F.2d 581, 587 n.12 (5th Cir. 1977) (pre-split, and thus binding in the 11th Cir.) ("Under the Jones Act, 46 U.S.C. § 688, the test for liability is whether 'employer negligence played any part, even the slightest, in producing the injury'" (quoting *Rogers*); *Brooks v. Wash. Terminal Co.*, 593 F.2d 1285, 1288 (D.C. Cir. 1979) ("The test whether an F.E.L.A. case should be submitted to the jury 'is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought'") (quoting *Rogers*).

[10] As we have just noted, the bottom line in *Raab*, so far as it concerns *Rogers*, is that *Rogers* did not do away with all causation except "but for" causation. *Raab*, 221 P.3d 219, 228-30 ¶¶ 32, 35, 37. The *Raab* court contrasted its conclusion on this point with that of the Tenth Circuit in *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997). *Raab*, 221 P.3d at 228-29 ¶32 & n.35. But the holding in *Summers* was that that the plaintiff was *not* entitled to a *Rogers*-based instruction. *Summers*, 132 F.3d at 606. The instruction actually given used the statutory language ("in whole or in part"), and that, said the *Summers* Court, was sufficient; plaintiff had no right to insist on the addition of *Rogers*-based language ("played any part, no matter how small"). *Id.* This, of course, is inexplicable if the

But there is no conflict among the lower courts in practice: Norfolk Southern does not cite a single case in which the "relaxed" standard was rejected in favor of what Norfolk Southern calls "traditional common law proximate cause."[11] Even the *Raab* court applied

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Summers court thought that what *Rogers* "definitively abandoned" was proximate cause in the broad sense. In fact what the *Summers* court found "definitely abandoned" in *Rogers* was the practice of "analyz[ing] liability under the FELA *in terms of* proximate causation." *Id.* (emphasis supplied). Neither *Summers*, nor any other case so far as Mr. Jordan can tell, suggests that *Rogers* abandoned the concept that some "but for" causes are, for policy reasons, too remote to support liability.

[11] Several of the cases cited by Norfolk Southern as insisting on "proximate cause" cite *Rogers* as the standard by which "proximate cause" is measured. *Gardner v. CSX Transp., Inc.*, 201 W.Va. 490, 498 S.E.2d 473 (1997), expressly declared that *Rogers* "established" "[t]he causation standard in FELA cases," and went on to quote *Rogers* "even the slightest" language. *Id.* at 482. The same is true of *Snipes v. Chicago, Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164-65 (Iowa 1992), which quoted *Rogers* "even the slightest" language in order to show "[t]he liberality with which the Supreme Court has applied this test," *i.e.*, of FELA negligence and causation. Much the same is true of *Chapman v. Union Pac. R.R.*, 237 Neb. 617, 627, 467 N.W.2d 388, 395 (1991) ("An action brought under the Federal Employers' Liability Act must be submitted to a jury if the jury could reasonably find that "employer negligence played any part, even the slightest, in producing the injury ... for which damages are sought." *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957). Therefore, "the role of the jury is significantly greater in . . . FELA cases than in common law negligence actions. The right of the jury to pass upon the question of fault and causation must be most liberally viewed." *Johannessen v. Gulf Trading & Transp. Co.*, 633 F.2d 653, 656 (2d Cir. 1980)").

what can only be described as a relaxed standard. In that case, a defective brake forced replacement of the lead locomotive, which in turn required plaintiff to enter a trailing locomotive to set the controls, where he hit his head on a low-hanging air conditioning unit. The court held that the jury was entitled to find that defective brake "was a proximate cause" of plaintiff's injury.[12] *Raab*, 221 P.3d at 222, 231.

There is, in short, not disagreement but essential unanimity: (1) the FELA plaintiff must prove more than "but for" causation; but (2) the standard by which this "more" is measured is, in comparison to what Norfolk Southern calls "traditional common law proximate cause," a "relaxed" standard. The controversy, such as it is, is entirely concerned with whether *Rogers* is among the many cases in which this Court has recognized the relaxed standard. *See Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 180 n.1 (2007) (Ginsburg, J., concurring) ("I do not read Justice SOUTER's concurring opinion as taking a position on the appropriate causation standard as expressed in *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), and *Crane v. Cedar Rapids & Iowa City R. Co.*, 395 U.S. 164, 89 S.Ct. 1706, 23 L.Ed.2d 176 (1969)"). And this purely academic question, so arcane and so unimportant that even Norfolk Southern did not

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[12] It bears repeating that what the *Raab* court said it was rejecting was not a relaxed causation standard, but the notion that only "but for" causation is required. *Raab*, 221 P.3d 219, 228-30 ¶¶ 32, 35, 37.

notice it when it petitioned for certiorari in *Sorrell*, simply does not merit this Court's review.

Finally, the supposed disagreement among the lower courts on which Norfolk Southern relies has persisted for quite a lengthy period of time. The first case that Norfolk Southern cites as applying the full proximate cause standard in a FELA case was decided in 1961, and the first case applying a "relaxed" proximate cause standard dates back to 1963. Pet. 12-13 & n.5. While the supposed disagreement dates back almost 50 years, Norfolk Southern has presented no basis for the Court to conclude any differences in emphasis or phraseology in the opinions have resulted in divergent outcomes, administrability problems in the lower courts, unfairly disparate results between different forums, or indeed any other adverse consequences. Norfolk Southern points to no cases that would have been decided differently had they been pending in a different state supreme court or federal circuit court. Because the supposed split in authority (assuming *arguendo* that it exists) has persisted for some 50 years with no negative consequences, review by this Court simply is not warranted.

III. ON THE MERITS, THE STANDARD FOR CAUSATION UNDER FELA IS RELAXED.

As explained above, the courts almost uniformly apply a relaxed standard of causation instead of what Norfolk Southern calls "traditional common law proximate cause." Norfolk Southern claims that a relaxed standard is inconsistent with this Court's cases, but it is not. There are numerous cases

(many decided before *Rogers*) in which this Court unmistakably applied a relaxed standard.[13] Nor is the relaxed standard inconsistent with the statute. Norfolk Southern finds in *Urie v. Thompson*, 337 U.S. 163 (1949), a hard and fast rule that FELA adopted then-existing common law except where otherwise stated, but the *Urie* Court looked, not merely to the common law, but also to another contemporaneously-enacted statute, *id.* at 184, "the spirit the statute [the FELA] contemplated for its administration and application," *id.* at 186, "the breadth of the statutory language, the Act's

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[13] *See, e.g., Tennant v. Peoria & Perkin Union Ry. Co.*, 321 U.S. 29 (1944) (railroad employee last seen walking out of view behind locomotive; his dismembered body later found strewn down the tracks; *held*: jury entitled to find that locomotive negligently backed over him, even though other scenarios were equally likely); *Webb v. Ill. Cent. R.R. Co.*, 352 U.S. 512 (1957) (railroad employee slipped on cinder; *held*: jury entitled to find that cinder came from railroad, despite the fact that there was no direct evidence to this effect, and multiple non-railroad sources were possible); *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 109 (1959) (Jones Act) (crewman washed overboard, subsequently manifested tuberculosis; *held*: jury entitled to find that dunking aggravated the T.B., despite fact that no medical witness so testified, and that medical witnesses testified to the opposite, and other potential causes were not negated. "The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation"); *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963) (employee bitten by mosquito; infection and amputation followed; *held*: jury entitled to find that mosquito in question was hatched and grew in one of the pools of water that railroad negligently allowed to stand on right-of-way). *See generally Lavender v. Kurn*, 327 U.S. 645, 651 (1946) (expressly approving a measure of "speculation and conjecture" in FELA cases).

humanitarian purposes, its accepted standard of liberal construction in order to accomplish those objects, the absence of anything in the legislative history indicating a congressional intent to require a restricted interpretation or expressly to exclude such occupational disease, and the trend of existing authorities dealing with the question. . . ."[14] *Id.* at 181. *See also Coray v. S. Pac. Co.*, 335 U.S. 520 (1949) (irreconcilable with Norfolk Southern's theory that common law principles necessarily govern FELA causation), and *Carter v. Atlanta & St. A.B. Ry. Co.*, 338 U.S. 430 (1949) (same) (relying on *Coray*).

IV. NORFOLK SOUTHERN'S ARGUMENT ABOUT THE FELA NEGLIGENCE STANDARD IS NOT PROPERLY BEFORE THE COURT, AND IN ANY EVENT, THE JURY INSTRUCTIONS IN FACT REQUIRED WHAT NORFOLK SOUTHERN CALLS "TRADITIONAL" COMMON LAW NEGLIGENCE.

At the end of its Petition, Norfolk Southern turns to the question of whether FELA negligence, like

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[14] This last point is worth additional attention. Citing just four lower court cases, "[n]ot all of [which] could be sustained" under the railroads' interpretation, the *Urie* Court wrote: "We would be most hesitant to adopt a construction of 'injury' as used in this Act which would overrule the decisions last cited or seriously impair their authority." *Urie*, 337 U.S. at 186. The Court should be much more hesitant to adopt a construction of "in whole or in part" that would overrule, or seriously impair, decisions from every one of the courts of appeal. *See* n.19, *supra*.

FELA causation, is governed by a "relaxed" standard. Pet. 14. That question is not properly before the Court, because Norfolk Southern did not argue it in the trial court, and, in any event, the instruction given was a traditional common law negligence instruction.

The Jury instruction to which Norfolk Southern attempts to fasten this argument read in full as follows:

> DEFECT OR INSUFFICIENCY IN TRACKS OR EQUIPMENT
>
> The law under which plaintiff brings this action provides that defendant shall be liable for injury resulting "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbeds, works, . . . or other equipment." This statutory provision does not mean that the railroad employer is responsible for injury of an employee merely because it was caused by some defect or insufficiency of one of the items referred to. To the contrary, the statute imposes liability on the railroad employer only when the defect or insufficiency is due to negligence, even the slightest, on the part of the employer. If there is an injury as the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, even the slightest, on the part of the railroad.

Opp. App. 20a. The term "negligence" had previously been defined as "the failure to use ordinary or

reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under circumstances similar to those shown by the evidence." *Id.* at 12a-13a.

Norfolk Southern asserts that these words "even the slightest" could have allowed the jury to find Norfolk Southern liable under a "slightest negligence" standard. Pet. 8-9. The Court should decline to review this issue.

First, Norfolk Southern failed to preserve the point below. At trial, Norfolk Southern complained continuously that the words "even the slightest," as used in this instruction, gave the wrong causation standard. It never once, however, suggested that the instruction affected the negligence standard. Indeed, the first suggestion to this effect came in its rebuttal brief in the Court of Appeals. Thus, Norfolk Southern errs when it says (Pet. 8) that it "reiterated its argument" about "slightest negligence" in the Court of Appeals; the first time it made that argument was in its Court of Appeals rebuttal brief. Even then, it did so only in passing, in half a dozen words unaccompanied by authority or reasoning. *See* Norfolk Southern's Rebuttal Brief in the Court of Appeals p. 12 ("The trial court incorrectly instructed the jury based upon the so-called 'watered down' version of causation and negligence"). So little, and so late, was Norfolk Southern's attempt to argue "slightest negligence" that the Court of Appeals saw the jury instruction issue as purely a causation issue. Pet. App. 9a ("Norfolk Southern raises the following issues on appeal, which we slightly reword: . . . .2.

Whether the trial court erred in instructing the jury concerning causation").

Indeed, Norfolk Southern's petition does not comply with this Court's Rule 14.1(g)(i), which requires that a petition state "when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

The second problem with Norfolk Southern's argument is that it is simply incorrect. The instruction did not have any effect on the previously-defined negligence standard. What it told the Jury was that Mr. Jordan had to prove at least some negligence. Proof of a defect or insufficiency in tracks or equipment was not enough; there had to be, in addition, proof that "the defect or insufficiency is due to negligence, even the slightest, on the part of the employer [railroad]." Opp. App. 20a. In this context, the words "even the slightest" did no more than put FELA's pure comparative negligence scheme in operation. The jury was still required to find "negligence," and nothing in the instruction suggests that the standard for negligence was anything other than as previously defined, the failure to use "ordinary and reasonable care." Opp. App. 25a. Logically, in order to find that "negligence,

even the slightest," was present, the jury had to find that negligence was present.[15]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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[15] Finally, and in any event, there is absolutely nothing to suggest that the instruction had any effect on the verdict. Where, as here, the verdict is a general verdict, and might have rested on something other than the supposedly erroneous instruction, the verdict must be affirmed unless it is shown that the supposed flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict." *Hedgpeth v. Pulido*, 129 S. Ct. 530, 530-31 (2008) (internal quotation marks omitted). Norfolk Southern never has attempted to make, and never could make, such a showing.

APPENDIX

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT
MEMPHIS

NO. CT-004175-03

DIV. II

JURY DEMAND

THOMAS DAVID JORDAN,

Plaintiff,

v.

BURLINGTON NORTHERN SANTA FE
RAILROAD COMPANY, A corporation;
and NORFOLK SOUTHERN RAILWAY
COMPANY, A corporation,

Defendant.

JURY CHARGE

Ladies and Gentlemen of the Jury:

You have now heard all of the evidence in this case, and after lunch you will hear the final arguments or summations of the lawyers for the parties. It is my duty to instruct you on the rules of law that you must follow and apply in arriving at your decision in this case, and you must follow the law as I instruct you.

As jurors, it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, prejudice or passion.

You are to consider all of my instructions as a whole and are to regard each in the light of all the others. If in these instructions any rule, direction or idea is repeated or stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others.

The order in which the instructions are given has no significance as to their relative importance.

Remember that any questions, objections, statements or arguments made by the lawyers during the trial are not evidence in this case; however, if the lawyers have stipulated or admitted any fact, you will regard that fact as being

conclusively proved as to the party or parties making the stipulation or admission.

If an objection to a question was sustained, you must not speculate as to what the answer might have been or the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; any such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

In reaching your verdict, you are to consider only the evidence in this case. You are not required to set aside your common knowledge, however, as you have the right to weigh the evidence in the light of your own observations, experiences and common sense.

The masculine form as used in these instructions applies equally to a female person or a corporation. The masculine form is simply used for convenience. Likewise, whenever the singular is used in these instructions, it may be taken equally to mean the plural if the context requires it.

The fact that a corporation is a party must not influence you in your deliberations or in your

verdict. Corporations and persons are equal in the eyes of the law. Both are entitled to the same fair and impartial treatment and to justice by the same legal standards.

EVIDENCE

You are to decide this case only from the evidence which was presented at this trial. The evidence consists of :

1) the sworn testimony of the witnesses who have testified, both in person and by deposition;

2) the exhibits which were received and marked as evidence; and

3) any facts to which all the lawyers have agreed or stipulated.

There are two kinds of evidence - direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of a witness about what the witness personally observed.

Circumstantial evidence is indirect evidence that gives you clues about what happened. Circumstantial evidence is proof of a fact, or a group of facts, that causes you to conclude that another fact exists. It is for you to decide whether a fact has been proved by circumstantial evidence. If you base your decision upon circumstantial evidence, you must be convinced that the conclusion you reach is more probable than any other explanation.

You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

WITNESSES

While you must consider all of the evidence which is admitted during the trial, this does not mean that you must accept all of the evidence as true or accurate.

You are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. You must consider all the evidence in the case. You may decide that the testimony of fewer witnesses on one side is more convincing than the testimony of more witnesses on the other side.

You are the sole and exclusive judges of the credibility or believability of the witnesses who have testified in this case. You must decide which witnesses you believe and how important you think their testimony is. You are not required to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

In deciding which testimony you believe, you should rely on your own common sense and everyday experience. There is no fixed set of rules to use in deciding whether you believe a witness, but it may help you to think about the following questions. These are the same questions I mentioned in my preliminary instructions. I will review them for you.

1. Was the witness able to see, hear, or be aware of the things about which the witness testified?

2. How well was the witness able to recall and describe those things?

3. How long was the witness watching or listening?

4. Was the witness distracted in any way?

5. Did the witness have a good memory?

6. How did the witness look and act while testifying?

7. Was the witness making an honest effort to tell the truth, or did the witness evade questions?

8. Did the witness have any interest in the outcome of the case?

9. Did the witness have any motive, bias, or prejudice that would influence the witness's testimony?

10. How reasonable was the witness's testimony when you consider all of the evidence in the case?

11. Was the witness's testimony contradicted by what that witness has said or done at another time, by the testimony of other witnesses, or by other evidence?

12. Has there been evidence regarding the witness's intelligence, respectability, or reputation for truthfulness?

13. Has the witness's testimony been influenced by any promises, threats, or suggestions?

14. Did the witness admit that any part of the witness's testimony was not true?

There may be discrepancies or differences within a witness's testimony or between the testimony of different witnesses. This does not necessarily mean that a witness should be disbelieved. Sometimes when two people observe an event they will see or hear it differently. Sometimes a witness may have an innocent lapse of memory. Witnesses may testify honestly but simply may be wrong about what they thought they saw or remembered. You should consider whether a discrepancy relates to an important fact or only to an unimportant detail.

You may conclude that a witness deliberately lied about a fact that is important to your decision in the case. If so, you may reject everything that witness said. On the other hand, if you decide that the witness lied about some things but told the truth about others, you may accept the part you decide is true and you may reject the rest.

Usually witnesses are not permitted to testify as to opinions or conclusions. However, a witness who has scientific, technical, or other specialized knowledge, skill, experience, training, or education

may be permitted to give testimony in the form of an opinion. Those witnesses are often referred to as "expert witnesses."

You should determine the weight that should be given to each expert's opinion and resolve conflicts in the testimony of different expert witnesses. You should consider:

1. the education, qualifications, and experience of each witness; and

2. the credibility of each witness; and

3. the facts relied upon by the witness to support the opinion; and

4. the reasoning used by the witness to arrive at the opinion.

You should consider each expert opinion and give it the weight, if any, that you think it deserves. You are not required to accept the opinion of any expert.

In this case certain expert witnesses were asked to assume that certain facts were true and to give an opinion based upon those assumptions. This is called a hypothetical question. You must determine if any fact assumed by the witness has not been established by the evidence and the effect of that omission, if any, upon the value of the opinion.

THEORIES AND CONTENTIONS

Ladies and gentlemen, I am going to tell you the theories and contentions of the parties.

It is the theory and contention of the Plaintiff, Thomas David Jordan, that on November 13, 2002, he was employed by the Defendant, Norfolk Southern Railway Company, performing work in the furtherance of his duties by preparing a train for interchange at a location known in the local railroad world as "Broadway" at a point between "Tower 17" and "K C Junction." It is the Plaintiff's theory and contention that, while performing tasks required of him by his employer, he was struck by a train owned and operated by Defendant, Burlington Northern Santa Fe Railroad Company, which was passing on its adjacent track, resulting in severe permanent and disabling injuries to him.

It is the further theory and contention of the Plaintiff that both defendants were at fault and that their combined fault was the legal cause of the accident and resulting injuries, and for which he brings this suit to recover money damages from them.

Each of the defendants, Norfolk Southern Railway Company and Burlington Northern Santa Fe Railroad Company, categorically denies negligence under the circumstances then and there existing; and they each deny fault to any extent whatsoever.

Moreover, it is the theory and contention of each Defendant that if either of them should be found to be at fault, which they deny, then the Plaintiff himself was at fault and that his fault was the sole, direct, proximate and legal cause of the accident such that his right to recover is either barred thereby or diminished by his degree of fault.

Ladies and gentlemen, I have given you the theories and contentions of the parties so I can tell you where the law places the burden of proving the issues in this case.

It is now my duty to explain the law that applies to the specific facts of this case. If any of the lawyers in this case have told you that the law is different than what I will tell you, you will take the law as given to you by the Court. It is your duty and yours alone to determine what the facts are. After you determine what the facts are, it becomes your further duty to apply those facts to the law as given to you by the Court free from any bias, prejudice or sympathy one way or the other.

In this case plaintiff has sued two (2) defendants both of which are Railroads. Plaintiff has sued Norfolk Southern Railway Company which is his employer. He has also sued Burlington Northern Santa Fe Railroad Company which is not his employer. Since certain legal principles are different where the employee is suing his employer, and where he is suing someone other than his employer, I will segregate the instructions as follows:

1. I will first give you instructions dealing with general principles of law that apply equally to all parties.

2. I will next instruct you on the law that applies exclusively between plaintiff and his employer, the defendant, Norfolk Southern Railway Company.

3. I will then instruct you on the law that applies exclusively to the case of the plaintiff against the defendant Burlington Northern Santa Fe Railroad Company.

BURDEN OF PROOF AND PREPONDERANCE OF EVIDENCE

In this action, the Plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

A. That the Defendants were at fault;

B. The nature and extent of the Plaintiff's injuries and damages.

The Defendants, as an affirmative defense, claim that Plaintiff was at fault. The effect of this affirmative defense is that if proved, it will either prevent Plaintiff from recovering a judgment in this case or will reduce the recovery of Plaintiff.

The Defendants have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the fault of Plaintiff.

The term "preponderance of the evidence" means that amount of evidence that causes you to conclude that an allegation is probably true. To prove an allegation by the preponderance of the evidence, a party must convince you that the allegation is more likely true than not true.

If the evidence on a particular issue is equally balanced, that issue has not been proven by a preponderance of the evidence and the party having the burden of proving that issue has failed.

You must consider all the evidence on each issue. Your verdict must not be based upon mere speculation, guess, or conjecture.

Therefore in deciding this case you must determine the fault, if any, of each of the parties. If you find that more than one of the parties are at fault, you will then compare the fault of the parties. To do this, you will need to know the definition of fault.

A party is at fault if you find by a preponderance of the evidence that the party was negligent and that the negligence was a legal cause of the injury or damage for which a claim is made.

Fault, as defined, has two parts: Negligence and legal cause. Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under circumstances similar to those shown by the

evidence. The amount of caution required of a person in the exercise of ordinary care depends upon the conditions apparent to him or that should be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence. Negligence will not be inferred from mere happening of an accident or occurrence of injury. It must be proved by direct or circumstantial evidence. A person may assume that every other person will use reasonable care unless the circumstances indicate the contrary to a reasonably careful person.

The second part of fault is legal cause. A legal cause of an injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred.

An act or omission which fails to prevent injury is a legal cause of the injury. There may be more than one legal cause of an injury.

To be a legal cause of an injury, there is no requirement that it be the only cause, the last act, or the one nearest to the injury, so long as it is a factor in producing the injury or damage.

The foreseeability requirement does not require the person guilty of negligence foresee the exact manner in which the injury takes place or the exact person who would be injured. It is enough that the person guilty of negligence could foresee, or through the exercise of reasonable care should have foreseen, the general manner in which the injury or damage occurred.

If you find, by a preponderance of the evidence, that a party was negligent and that the negligence was a legal cause of the injury or damage for which a claim was made, you have found that party to be at fault. As I said before the plaintiff has the burden to prove fault on behalf of the defendants. If the plaintiff fails to do so, you should find such defendant's fault to be zero. Likewise, the defendants have the burden to prove fault on behalf of the plaintiff. If the defendants fail to do so, you should find the plaintiff's fault to be zero. If you find both the plaintiff and one or both of the defendants to be at fault, you must then determine the percentage of fault chargeable to each of them.

You must also determine the total amount of damages sustained by the plaintiff. You must do so without reducing those damages by any percentage of fault you may have charged to any party. I will instruct you on the law of damages in a few minutes.

When you have made these decisions, as I have instructed you, it becomes my duty under the law to determine the amount of damages that you have awarded depending upon your finding as to fault, if any, with respect to each of the parties.

Your first obligation is to determine the fault, if any, of the parties. Next, you must assign a percentage of fault, if any, to each party. This percentage figure for each party may range from zero (0) percent to one hundred (100) percent. When the percentages of fault of all parties being compared are added together, the total must equal either 0% or 100%.

The parties to whom you may assign fault are:

Norfolk Southern Railway Company, A corporation

Burlington Northern Santa Fe Railroad Company, A corporation

Thomas David Jordan

If you find more than one party at fault, you must compare the fault of each party in order to apportion the fault among such parties.

You should weigh the respective contributions of each person to the occurrence in question and, considering the conduct of each as a whole, determine whether one made a larger contribution than the other(s), and if so, to what extent it exceeds that of the other(s).

The percentage of fault assigned to any person whose conduct may be compared should depend upon all of the circumstances of the case. The conduct of each person may make that person more or less at fault, depending upon all of the circumstances. In order to assist you in making this decision, you will be given a list of factors to consider. But the determination of fault on the part of any person and the determination of the relative percentages of fault, if any, is a matter for you alone to decide. You may use some, all, or none of the factors listed, and you may also consider any other factors that you find to be important under the facts and circumstances of this case.

1. Whose conduct more directly caused the injury to the plaintiff;

2. How reasonable was the person's conduct in confronting a risk; for example, did the person know of the risk or should the person have known of it;

3. Did the person fail to reasonably use an existing opportunity to avoid an injury to another;

4. Was there a sudden emergency requiring a hasty decision;

5. What was the significance of what the person was attempting to accomplish by the conduct.

By listing these factors, I do not mean to indicate that these are the only factors you could consider in apportioning fault between parties who are negligent, nor do I intend to suggest to you that any party is negligent. That is a matter entirely for you to decide and you should rely on your own common sense and ordinary experience in apportioning fault.

Your next obligation is to determine the full amount of damages, if any, sustained by:

Thomas David Jordan

In arriving at the full damage figure for a party, you should not consider in any way the question of fault. Do not reduce the damages by any percentage of fault.

The court will provide you with a special verdict form that will assist you in your duties.

LAW AS RELATES TO NORFOLK SOUTHERN RAILWAY COMPANY AS EMPLOYER OF THOMAS DAVID JORDAN, EMPLOYEE

Although there are two defendants in this lawsuit, it does not follow from that fact alone that if one is liable, both are liable. Each defendant is entitled to a fair consideration of his own defense, and is not being prejudiced by the fact, if it should become a fact, that you find against the other. Unless otherwise stated, all instructions given you govern the case as to each defendant.

Please remember, all of my earlier instructions regarding fault of the parties including negligence and legal cause apply to this Defendant.

In this case plaintiff has sued two railroad defendants. Plaintiff's claim against his employer Norfolk Southern Railway Company is brought in plaintiff's capacity as an employee. The rights, duties and obligations between plaintiff employee and the employer Norfolk Southern Railway Company in this case are based upon a law of the United States commonly called the Federal Employers' Liability Act. This title does not mean that every employer is liable to every employee for every injury. The instructions I am about to give you apply exclusively between the plaintiff employee and the defendant employer Norfolk Southern Railway Company and have no application to plaintiff's claim

against the other defendant, Burlington Northern Santa Fe Railroad Company.

The plaintiff in this case claims damages for personal injuries, alleged to have been suffered as a result of negligence on the part of the Norfolk Southern Railway Company, his employer.

Section 1 of the Federal Employers' Liability Act as set forth in 45 U.S.C.A. §51, under which the plaintiff claims the right to recover damages in this action, provides in part that:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

It is established that, at the time and place alleged in the complaint, this defendant was a common carrier by railroad engaged in interstate commerce; that the plaintiff was then an employee of this defendant engaged in such commerce; and that the plaintiff's right, if any, to recover against Norfolk Southern Railway Company is governed by the provisions of the Federal Employers' Liability Act.

This is a negligence action. This means that before plaintiff can recover he must prove that his

injury resulted in whole or in part from the negligence or fault of this defendant.

A railroad is not an insurer of the safety of its employees, and negligence on the part of the railroad may not be presumed or inferred from mere proof of the happening of an accident.

No liability may be imposed upon the railroad unless the evidence disclosed (1) that it failed to exercise reasonable care under the circumstances, and (2) that any such failure in whole or in part legally caused the injuries of the plaintiff. As I said before, the burden is upon the plaintiff to prove both of the foregoing elements of his case by a preponderance of the evidence.

UNAVOIDABLE RISKS OR DANGERS

A railroad is not liable for those risks or dangers which it could not avoid in the observance of its duty of due care; in order to recover plaintiff is required to prove by a preponderance of the evidence that the defendant through its agents, servants or employees was guilty of negligence, which, in whole or in part, legally caused the accident and injury. You must determine the extent to which, if any, the risks and dangers involved in this case were unavoidable, if at all.

The Federal Employers' Liability Act also provides that in any action brought against any common carrier under or by virtue of the Act. Such employee shall not be held to assume any risk of his employment in any case where such injury resulted

in whole or in part from the negligence of the railroad. If you find that the Defendant, Norfolk Southern Railway Company was negligent and that such negligence was a legal cause of injury sustained by the Plaintiff, then even if the Plaintiff may have continued to work though he knew of the unsafe nature of the dangers existing, Plaintiff is entitled to recover damages.

DEFECT OR INSUFFICIENCY IN TRACKS OR EQUIPMENT

The law under which plaintiff brings this action provides that defendant shall be liable for injury resulting "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbeds, works, . . . or other equipment." This statutory provision does not mean that the railroad employer is responsible for injury of an employee merely because it was caused by some defect or insufficiency of one of the items referred to. To the contrary, the statute imposes liability on the railroad employer only when the defect or insufficiency is due to negligence, even the slightest, on the part of the employer. If there is an injury as the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, even the slightest, on the part of the railroad.

SAFER MANNER OF DOING WORK

It was the continuing duty of the defendant, as an employer, at the time and place in question, to

use ordinary care under the circumstances, in furnishing the plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be performed is reasonably safe, under the circumstances shown by the evidence in the case.

DUTY REGARDING "TRACK, TOOLS, APPLIANCES, AND EQUIPMENT" AND "OPERATIONS"

The defendant has a duty to use ordinary care to provide its employees with reasonably safe and suitable tracks, tools, machinery and appliances with which to do their work, and which reasonably serve the purpose for which they were intended. As a general guideline for you, the test is not whether the appliances to be used are absolutely safe, but whether or not the employer has exercised reasonable care and diligence commensurate with the practical operation of the railroad to make them reasonably safe.

However, the employer is not required to furnish the latest, best and safest track, tools, machinery or appliances, or to discard standard tools, machinery track or appliances upon the discovery of later developments or better equipment or appliances. Neither is there any duty on the

employer to anticipate misuse of such equipment nor to guard against the consequences of misuse.

Ordinarily, an employee is not required to make an inspection of the tools and equipment furnished him by his employer. In the absence of knowledge to the contrary and in the absence of circumstances that caution him or would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has furnished him with safe tools and appliances with which to perform his work, and he may rely and act on that assumption.

However, it is the duty of the employee to use ordinary care to discover open and obvious defects which render such tools or equipment dangerous to use in the performance of his work.

ACTUAL OR CONSTRUCTIVE NOTICE OF DEFECTIVE CONDITION

Before you may find a railroad liable for the injury of an employee resulting from a defective condition in equipment or his place of work, you must be satisfied that the railroad had either actual or constructive notice of the defective condition and that it had a reasonable opportunity to remove or repair the defect before the occurrence involved in this action.

Actual notice of a condition is said to exist when one has direct information of the condition. Constructive notice of a condition is said to exist when the condition is plainly visible or has existed

long enough that by the use of reasonable care it should have been discovered. The legal effect of constructive notice is the same as actual notice.

To find that a railroad had notice, actual or constructive, of a defective condition, you must be satisfied that such notice was received by an employee who was authorized to repair or remedy such condition, or by an employee having a duty to report such condition to one in authority or by a person who, in a reasonable delegation of responsibility, ought to have had such authority and duty.

DUTY OF PLAINTIFF TO EXERCISE REASONABLE CARE

It was the continuing duty of the plaintiff to exercise reasonable and ordinary care for his own safety and protection. In your consideration of this issue, you may consider the plaintiff's actions in the light of any conditions known to him. If you find that he did not exercise such care as a reasonably prudent person would under like circumstances, and that such conduct contributed, in whole or in part, to the plaintiff's injury, then he is negligent.

The plaintiff was also under a duty, constant and continuing, to exercise reasonable care to inform himself of the proper methods of doing his work and to minimize for himself the risks and hazards necessarily inherent in it and which the defendant could not remove by the exercise of ordinary care. It was his duty to exercise reasonable care to inform himself of his surroundings, of the character and

type of the instrumentalities with which he was engaged or with which he might come in contact and of any condition which might create any danger or hazard for him, including working in close clearance conditions on Broadway, and to use such care to avoid injury from it.

DUTY REGARDING "ORDINARY RISKS OR HAZARDS"

During all the time he was working, and at the time he was injured, the law imposed upon plaintiff the duty to exercise reasonable care for his safety. The defendant owed him no duty to exercise a higher degree of care for his safety than he owed to himself.

Plaintiff was required to exercise reasonable care to protect himself from injury from the ordinary hazards and dangers of his employment not resulting from defendant's negligence and to protect himself from injury from such hazards however and whenever they might be encountered.

Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows that the amount of caution required, in the use of ordinary care, will vary with the nature of what is being done, and all the surrounding circumstances shown by the evidence in the case. To put it another way, as the danger that should reasonably be foreseen increases, so the amount of care required by law also increases as to both parties.

In determining whether or not the employer and employee to this cause discharged the duties imposed upon each of them in exercising reasonable care and diligence, it is proper for you to take into consideration the plaintiff's familiarity with the place in which he customarily worked, and his familiarity with the nature of the work which is customarily performed in that place by other employees.

All work on a railroad involves some danger, but it has to be done and the dangers involved do not involve liability provided the railroad takes reasonable precautions consistent with the conduct of the business.

You have been instructed that plaintiff was under a duty to exercise reasonable care for his own safety. In your consideration of this issue, you may consider plaintiffs action's in the light of any condition known to him (or conditions which should have been known to him in the exercise of ordinary care.)

The plaintiff was under a duty to observe obvious and apparent conditions. Every person owes to himself the duty to see what is plainly to be seen by the ordinary use of his senses and, if clearly visible, it is deemed, in law, to have been seen. If you find from the evidence in this case, that the condition of which the plaintiff complains was one which a person using ordinary and reasonable care could have discovered and avoided, then you may find that person to have been negligent.

COMPANY RULES AND REGULATIONS

Reference has been made in this case to certain rules adopted by the railroad for the safety of its employees. These rules were not admitted into evidence as legal standards of duty but as evidence of the degree of reasonable care to be exercised on the part of either the plaintiff or the defendant in situations to which the rules apply.

LAW AS RELATES TO BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY

I have previously instructed you upon the law as applies to Norfolk Southern Railway Company, as the employer of the plaintiff. I will now instruct you on the law as applies to the defendant Burlington Northern Santa Fe Railroad Company.

As I have explained before, the Plaintiff Thomas David Jordan is not an employee of Defendant Burlington Northern and Santa Fe Railway Company. As such, the Federal Employers' Liability Act has no application to Defendant Burlington Northern and Santa Fe Railway Company and Burlington Northern and Santa Fe Railway Company has no duty to provide plaintiff a reasonably safe place to work. The plaintiff's theory against Burlington Northern Santa Fe is under common law negligence.

A claim for negligence requires the following elements:

(1) a duty of care owed by the defendant to the plaintiff;

(2) conduct by the defendant falling below the standard of care amounting to a breach of that duty;

(3) an injury or loss;

(4) causation in fact; and

(5) proximate or legal cause.

If you find from the greater weight or preponderance of the evidence that the headlight on the Burlington Northern train was not shining at all, as alleged, then you have found Burlington Northern was negligent.

Similarly, if you find from the greater weight or preponderance of the evidence under the circumstances then and there existing that Burlington Northern had a duty to engage either the bell, or horn, or both, by its failure to do so, then you have found that Burlington Northern was negligent.

In determining whether Burlington Northern was at fault, you must then proceed to determine whether any negligence that you may have found on the part of Burlington Northern was a legal cause of the accident in question. In doing so you must follow all of my earlier instructions regarding legal cause.

DAMAGES

If you find that the Plaintiff is entitled to recover from the Defendant, then you should award an amount to the Plaintiff for each of the following elements of claimed loss or harm, provided you find that it was or will be suffered by him/her and it was legally caused by the fault of the defendant.

First you should determine what, if any, reasonable compensation Plaintiff is entitled to recover for the following:

1. Past physical pain and suffering, including loss of capacity for the enjoyment of life,

2. Permanent impairment,

3. Future physical pain and suffering, including future loss of capacity for the enjoyment of life.

These are often referred to as "non-economic" damages.

No definite standard or method of calculation is prescribed by law by which to fix compensation for such injuries; nor is the opinion of any witness required as to the amount. In making such calculation, you shall exercise your authority with calm and sensible judgment and the damages you fix shall be just and reasonable in the light of the evidence.

You should also consider what, if any, "economic" damages were or will be suffered. These include:

1. the reasonable value of medical care, services, and supplies reasonably required in the future treatment of the Plaintiff, and

2. the value of earning capacity lost in the past and that will be reasonably certain to be lost in the future as a result of the injury in question.

In determining what, if any, award should be made for lost earning capacity, you should consider any evidence of Plaintiff's earning capacity, including, but not limited to, the following: the Plaintiff's health, age, character, occupation, past earnings, intelligence, skill, talents, experience and record of employment. You should also consider the Plaintiff's physical capacity to perform work at the time of injury and thereafter. It is not the loss of time or actual earnings that may be recovered, but the loss of the ability to earn.

You are not permitted to award speculative damages, which means compensation for future loss or harm which, although possible, is conjectural or not reasonably certain.

However, you should compensate a Plaintiff for any loss or harm which is reasonably certain to be suffered as a legal result of the injury in question.

If you find from a preponderance of the evidence that the plaintiff has and will with

reasonable certainty in the future experience pain and suffering as a result of his injuries, he is entitled to be fairly and reasonably compensated therefor, but such compensation may not be determined by you based upon any hourly, daily, monthly or other unit of time measurement for there is no mathematical formula by which factors of this kind can be fairly determined.

Your award, if any, will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award, if any.

Thus, in the event that you should find that plaintiff is entitled to an award of damages in this case for loss of wages and/or future earning capacity, you should take into consideration such loss after income tax; that is, you should determine the actual or net amount that plaintiff has lost or will lose, taking into consideration that any past or future earnings would be subject to income taxes, and you should award plaintiff only what he actually has lost or will lose, that is, his earnings less any such tax that would be due on them. Further, in consideration of such loss and to the extent there is evidence concerning such, you may take into consideration the following factors: the number of years the plaintiff may be expected to live and work; his wages and fringe benefits, his likely wage increases due to promotions, seniority or experience raises, merit raises, and the effect of inflation or deflation of his future wages.

Since money can earn interest, an amount to cover a future loss of earnings is more valuable to

plaintiff if received today than if the same amount is received in the future. Therefore, if you decide to award plaintiff an amount for future loss of earning capacity, it must be discounted to present value by a factor equal to an after tax rate of return on a risk-free investment according to accepted economic principles. Although you are not bound to accept the conclusions or opinions of the economists who testified during the trial, I instruct you that their testimony on discount was based on acceptable economic principles. However, it is for you and you alone to determine the weight, faith and credit to be given to any witness.

In the event you find that plaintiff is entitled to receive an award for physical disability, mental and/or physical pain and suffering, past, present, and future, I instruct you that such an award is not subject to income tax, and any amount which you award on this basis will not be taxed by the federal or state government. You are not to consider the effect of tax on said sum because no tax will be due on it. [Lunch Break]

CONCLUDING INSTRUCTIONS

I have given you various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you decide are the facts. My instructions on any subject, including instructions on damages, must not be taken by you to indicate my opinion of the facts you should find or the verdict you should return.

Your attitude and conduct at the beginning of your deliberations are very important. It is rarely productive for any juror to immediately announce a determination to hold firm for a certain verdict before any deliberations or discussions take place. If you were to do that, it might be difficult for you to consider the opinions of your fellow jurors or change your mind, even if you later decide that you might be wrong. Please remember that you are not advocates for one party or another. You are the judges of the facts in this case.

Each of you should deliberate and vote on each issue to be decided.

Before you return a verdict to the Court, however, each of you must agree on it in its final and complete form so that each of you will be able to state truthfully that the verdict is his or hers. The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty to consult with one another and to reach an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is not correct. But do not surrender your honest conviction as to the weight or effect of evidence solely

because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

The law forbids you to determine any issue in this case by chance. Thus, if you decide that a party is entitled to recover, you must not arrive at the amount of damages to be awarded by agreeing in advance to take each juror's independent estimate of the amount to be awarded, to total those amounts, to divide the total by twelve and to make that resulting average the amount you award.

Some of you may have taken notes during the trial. Once you retire to the jury room you may refer to your notes, but only to refresh your own memory of the witnesses' testimony. You are free to discuss the testimony of the witnesses with your fellow jurors, but each of you must rely upon your own individual memory as to what a witness did or did not say.

In discussing the testimony, you may not read your notes to your fellow jurors or otherwise tell them what you have written. You should never use your notes to persuade or influence other jurors. Your notes are not evidence. Your notes should not be considered as a transcript of the testimony and should carry no more weight than the unrecorded recollection of another juror.

If, during your deliberations, you would like to review the exhibits, then please knock on the door of the jury room and ask my court officer to bring them to you.

If a question arises during deliberations and you need further instructions, please print your question on a sheet of paper, knock on the door of the jury room, and give the question to my court officer.

I will read your question and I may call you back into the courtroom to try to help you. Please understand that I may only answer questions about the law and cannot answer questions about the evidence. [Lawyers to Bench/Excuse Mrs. Peyton]

You will now retire and select one of your number to act as presiding juror who will preside over your deliberations. As soon as all twelve of you have agreed upon a verdict, your presiding juror will complete and sign the Verdict Form and you will knock on the jury deliberation room door to advise one of my court officers that you have agreed on a verdict.

Remember that you may deliberate only when all of you are present in the jury room. You may not resume your deliberations after any breaks until all of you have returned to the jury room.

VERDICT FORM

We, the jury, make the following answers to the questions submitted by the Court:

1. **Was Defendant, Norfolk Southern Railway Company negligent under the Court's instructions?**

YES _____ NO _____

2. **Was Defendant, Burlington Northern Santa Fe Railroad Company negligent under the Court's instructions:**

(a) **by turning the headlight off?**

YES _____ NO _____

(b) by not engaging the bell or horn or both?

YES _____ NO _____

(If your answers to Questions 1 and 2 are all "no," sign the verdict form and return it to the courtroom. If you answered "yes" to any question in 1 or 2 above, proceed to Question 3, 4 and 5.)

3. **Was Plaintiff, Thomas David Jordan, negligent under the Court's instructions?**

YES _____ NO _____

4. Considering your answers to Questions 1, 2 and 3, please state in percentage terms the relative fault, if any, to be attributed to the parties under the Court's instructions.

Defendant, Norfolk Southern Railway Company

_____% (0-100%)

Defendant, Burlington Northern Santa Fe Railroad Company

_____% (0-100%)

Plaintiff, Thomas David Jordan

_____% (0-100%)

TOTAL: 100%

5. Without considering the percentage of fault found in Question 4, what total amount of damages do you find to be sustained by Plaintiff, Thomas David Jordan?

$_____

_____ _____

Date Presiding Juror

No 09-788

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY
Petitioner

v.

THOMAS DAVID JORDAN,
Respondent

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

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REPLY BRIEF

In the petition Norfolk Southern demonstrated deep and acknowledged divisions of authority over the principal elements of a FELA claim—(1) whether FELA replaced ordinary common law causation with "slightest" causation and (2) whether FELA abrogated traditional common law negligence in favor of "slightest negligence Jordan does not meaningfully contest the existence of either conflict Instead the Brief in Opposition focuses principally on various claimed procedural obstacles None however is substantial The issues were litigated below and at Jordan's behest and over Norfolk Southern's objection the court gave a jury instruction that erroneously employed the same even the slightest language that has bedeviled the lower courts. Pet App 69a 70a and sharply divided this Court *see Norfolk S Ry v Sorrell* 549 U S 158 172 77 (2007) (Souter J , concurring), *id* at 178 (Ginsburg, J concurring in the judgment) Compounding the prejudice this instruction applied only to Norfolk Southern in stark contrast to a common law causation instruction that governed Jordan's negligence claim against Burlington Northern

The petition should be granted to provide clarity in this area of continuing confusion on an issue that arises in virtually every FELA case

I THE DECISION BELOW WIDENS A CONFLICT OVER FELA'S CAUSATION STANDARD, AND CONFLICTS WITH THIS COURT'S PRECEDENTS

A There exists a decades old division of authority over whether FELA requires a showing of common law proximate cause or instead has substituted relaxed or slightest' causation (as Jordan advocated

below) At least seven state supreme courts hold that a FELA plaintiff must show that his injuries were proximately caused by the railroad's negligence Pet 11 12 & n 5 In direct conflict various federal courts of appeals have mistakenly interpreted *Rogers* v *Missouri Pacific Railroad*, 352 U S 500 (1957) as relaxing FELA's causation standard Pet 12 14 Jordan grudgingly concedes "that there is some disagreement on the exact meaning of *Rogers* Opp 17 *id* 18 19 His arguments therefore seek only to distract from not deny the conflict In any event they fail

First Jordan observes that some cases that embrace proximate causation also cite *Rogers* *Id* 20 & n 11 But this would be significant only if *Rogers* were irreconcilable with proximate cause which it is not Pet 20 21 *Sorrell* 549 U S at 175 (Souter J concurring) More to the point that is the question presented for this Court's resolution on the merits What matters here is that various courts understand *Rogers* and proximate cause to be entirely compatible [1] and this understanding conflicts clearly with courts that read *Rogers* as abrogating proximate cause

Second Jordan argues that "there is no conflict among the lower courts in practice" Opp 20 His argument appears to be that even courts expressly *saying* that proximate cause is required apply some lesser standard in practice So for instance, Jordan

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[1] For instance in *Gardner* v *CSX Transportation Inc* the West Virginia Supreme Court both cited *Rogers* and correctly held that "to prevail on a claim under [FELA] a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately in whole or in part to plaintiff's injury" 498 S E 2d 473 483 (W Va 1997)

argues that in *Raab* v *Utah Railway* 221 P 3d 219 (Utah 2009) the Utah Supreme Court "applied what can only be described as a relaxed standard, Opp 20 21 But it is unclear what makes *Raab*'s factual analysis relaxed" And more fundamentally *Raab* squarely rejected the plaintiff's request for a "relaxed standard held that there is no statutory support for reading *Rogers* as eliminating the requirement of proximate causation' and explained that 'such a reading would be contrary to the Court's announced interpretive approach to FELA" 221 P 3d at 225 & n 14, 229, *accord Marazzato* v *Burlington N R R* 817 P 2d 672 674 75 (Mont 1991) Jordan may not perceive any conflict here but *Raab* expressly did 221 P 3d at 230

Third Jordan disparages the issue as 'academic, 'unimportant, and 'arcane Opp 21 On the contrary this issue arises repeatedly, as demonstrated by the numerous authorities addressing the issue Pet 10 15 & nn 5 7 Hundreds of FELA cases are filed each year in federal court [2] in addition to numerous FELA cases filed in state court and the Jones Act cases employing the same standards [3] Causation is an element in each It is commonplace that juries are presumed to follow their instructions *CSX Transp Inc* v *Hensley* 129 S Ct 2139 2141 (2009) (per curiam)—which surely is why Jordan fought the issue so hard below Supp App 6a Indeed Jordan

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[2] *See* Admin Office of U S Courts *Annual Report of the Director Judicial Business of the United States Courts* tbl C 2A at 146 (2008) *available at* http //www uscourts gov/judbus2008/appendices/C02ASep08 pdf (more than 3300 federal FELA cases filed from 2004 2008)

[3] *See Am Dredging Co* v *Miller* 510 U S 443 456 (1994) (Jones Act adopts the entire judicially developed doctrine of liability under [FELA]" (internal quotation marks omitted)

ultimately concedes that [t]he reporters are filled with FELA cases in which causation is truly at issue" Opp 16 It therefore is no surprise that the outcome of FELA cases indeed turns on the causation standard In *Syverson* v *Consolidated Rail Corp* for instance, the Second Circuit reversed summary judgment for the railroad Although it would have affirmed dismissal 'had this been a negligence action at common law" reversal was required under FELA's "substantially diluted" and 'relaxed' causation standard FELA permits liability for risks that would be too remote to support liability under common law" 19 F 3d 824 825 28 (2d Cir 1994) *accord* AAR Br 7 10 (discussing cases in which the causation standard was critical) An outcome determinative legal standard that has hopefully divided the lower courts is precisely the type of issue this Court should grant certiorari to decide

B Review additionally is warranted because the slightest causation standard conflicts with this Court's precedents The Court repeatedly has held that FELA requires a showing of proximate cause Pet 19 22 & n 11 Notably Jordan does not dispute this showing Instead he responds that there also 'are numerous cases (many decided before *Rogers*) in which this Court unmistakably applied a relaxed [causation] standard" Opp 22 23 & n 13 If this were true then there would exist a conflict in this Court's precedents that only this Court could resolve And that would be more reason not less, to grant the petition

In fact however not one of the cases cited by Jordan purports to "appl[y] a relaxed causation standard" At least three of them specifically articulate proximate cause as the governing standard See *Carter* v *Atlanta & St Andrews Bay Ry* 338 U S

430 435 (1949) *Coray* v *S Pac Co* 335 U S 520 523 (1949), *Tennant* v *Peoria & Pekin Union Ry* 321 U S 29 32 (1944) *cf* Pet 20 21 & n 10 Others say nothing about proximate cause at all [4] Jordan's point again seems to be that whatever standard the Court articulated the one it actually applied was 'relaxed Even were this true—and how Jordan determines what constitutes 'relaxed causation he does not explain—it does not remotely suffice to overcome the numerous cases in which this Court specifically has stated that FELA requires proximate cause See Pet 19 20 & n 11

Given the clarity of these precedents Jordan ultimately is forced to attack the 'rule that FELA adopted then existing common law except where otherwise stated Opp 23 But that is precisely the rule this Court has articulated on six or more occasions *E g Sorrell*, 549 U S at 165 66 (Absent express statutory language to the contrary the elements of a FELA claim are determined by reference to the common law '), *Urie* v *Thompson* 337 U S 163 182 (1949) [5] Critical here FELA did not abrogate the common law standard of proximate causation which therefore governs

C Having presented no serious argument to counteract the showing of a split of authority and a con

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[4] *Webb* v *Illinois Central Railroad* far from rejecting proximate cause explained that "we do not think that the case presents an issue of causation and simply quoted *Rogers* 352 U S 512 515 16 (1957) And *Lavender* v *Kurn* articulated no special rule for FELA cases but spoke generally about inferences that factfinders may draw 327 U S 645 651 (1946)

[5] *Accord Norfolk & W Ry* v *Ayers* 538 U S 135 145 (2003) *Metro North Commuter R R* v *Buckley* 521 U S 424 429 (1997) *Consol Rail Corp* v *Gottshall* 512 U S 532 544 (1994) *Monessen S W Ry* v *Morgan* 486 U S 330 337 38 (1988)

flict with this Court's precedents. Jordan is left to offer arguments why ultimately he would prevail on the merits. Opp. 7-17. These arguments are premature at this stage and mistaken in any event.

1. Jordan first contends that, whatever the propriety of a "slightest" cause standard, the jury instructions in fact required "common law proximate cause." *Id.* 7 (capitalization omitted). There can be no question, however, that the court instructed the jury to apply slightest causation:

> [FELA] imposes liability on the railroad employer "when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence *even the slightest* on the part of the employer."

Pet. App. 70a (emphasis added). Nor can Jordan be heard to argue that this instruction embodies anything other than relaxed causation. Jordan himself advocated this language precisely because it embodies such a standard:

> That is the standard of causation under the FELA which is exactly the point I was driving home a minute ago. It says "Legal cause of damage"—we can go pull *Rogers*, you just read from that and that's what it said. That's what *Rogers* and the United States Supreme Court and every court that's interpreted it says:
>
> "Legal cause of damage or complaint. Any part *no matter how small,—and that's really the standard*—in bringing about or actually causing the injury or damage."

Supp. App. 6a (emphasis added).

Jordan notes that elsewhere, the court instructed the jury that "'[i]n order to find that it was a proximate cause' you must find that the injury was the

natural and probable consequence of the railroad's negligence" Opp 8 Thus, he says 'the trial court's causation instruction was in substance a proximate cause instruction *Id* But the remainder of the instructions served only to emphasize the relaxed nature of the causation standard applied against Norfolk Southern The jury charge distinguished repeatedly between the standards applicable to Norfolk Southern under FELA, and those applicable to Jordan's separate common law negligence claim against Burlington Northern *Compare, e g* Jordan App 17a ("[t]he instructions I am about to give you apply exclusively between the plaintiff employee and [Norfolk Southern] and are "based upon [FELA]') *with id* 26a (FELA has no application to Burlington Northern "plaintiff's theory against [Burlington Northern] is under common law negligence) *and id* 27a (common law negligence requires 'proximate or legal cause) Burlington Northern, of course was found not liable And if it were true as Jordan posits that the jury considered both the 'even the slightest' standard and also the earlier instruction on legal cause when evaluating Norfolk Southern's liability which is improbable the internal contradiction in the instructions is more reason to vacate and remand

2 Jordan further argues that causation was never seriously contested at trial" Opp 15 But that is an issue to be determined by a properly instructed jury And it is incorrect in any event A principal focus of Norfolk Southern's closing argument was that its conduct was not the cause of Jordan's injuries *See* generally Trial Tr at 2022 31 *Jordan* v *BNSF* No CT004175 03D2 (Tenn Cir Ct Feb 8 2006) The argument could not have been more directly stated [W]hen you think about it when you analyze the evidence the evidence shows that close [railroad

track] clearances did not—[were] not a legal cause of this accident" *Id* 2022

Furthermore, Norfolk Southern argued that Burlington Northern's failure to use its headlight and bell caused Jordan's injuries Pet App 6a 7a The evaluation of this argument necessarily was affected when the court instructed the jury to apply different causation standards to Norfolk Southern and Burlington Northern *Supra* 6 7 cf also Jordan App 16a (in assessing fault the jury should consider [w]hose conduct more directly caused the injury to the plaintiff) Far from causation not being contested these two causation arguments were a centerpiece of Norfolk Southern's defense at trial

3 Finally, Jordan argues that the use of the phrase "even the slightest" related to 'a negligence instruction not a causation instruction Opp 14 For the reasons discussed next the use of a relaxed negligence standard presents an even starker conflict than relaxed causation, and finds even less support in this Court's precedents If Jordan is right this is further reason that the petition should be granted

II THE DECISION BELOW DEEPENS AN ENTRENCHED DIVISION OF AUTHORITY OVER FELA'S NEGLIGENCE STANDARD

A The petition also demonstrates even deeper division over whether FELA embraces a 'slightest negligence standard (in addition to slightest *causation*) Pet 15 18 After Jordan's Brief in Opposition it could not be clearer that this issue merits the Court's attention He does not even attempt to dispute the existence of the entrenched circuit split He also presents no serious argument that this Court has embraced "slightest negligence which it has not See *id* 22 23 On the contrary ' [s]o far as negli

gence is concerned that standard is the same—ordinary prudence—for both Employee and Railroad alike " *Sorrell* 549 U S at 169 (quoting *Page* v *St Louis Sw Ry* 349 F 2d 820 823 (5th Cir 1965)) Notably even some courts that have adopted the erroneous slight causation standard have rejected slight negligence as inconsistent with FELA and *Rogers E g Montgomery* v *CSX Transp Inc* 656 S E 2d 20 26 28 (S C 2008) see also *Coffey* v *Ne Ill Reg l Commuter R R (Metra)* 479 F 3d 472 476 (7th Cir 2007) This issue plainly warrants the Court's attention and the fact that Jordan does not argue otherwise speaks volumes

B Jordan focuses his attention upon claimed defects in the presentation of the issues These arguments likewise fail

1 Jordan first argues that the issue was insufficiently preserved Opp 26 27 Specifically he says Norfolk Southern never once suggested that instruction affected the negligence standard *Id* 26 On the contrary Norfolk Southern s trial counsel broadly objected to any use of the term 'even the slightest Supp App 5a 6a 8a He specifically linked that phrase to 'the railroads duties *id* 6a and to the 'railroad s exposure to negligence standards *id* 8a In response Jordan s counsel himself recognized that the phrase "even the slightest 'talks about the *duty* of the railroad under [FELA] ' *Id* 10a (emphasis added) In posttrial motions Norfolk Southern likewise objected to the instruction as incorrectly stating [t]he degree of negligence to be applied in this case *Id* 14a

Most importantly Jordan effectively concedes that the point was preserved He says that Norfolk Southern made this argument for the first time 'in its Court of Appeals rebuttal brief ' Opp 26 But nearly

the same language that Jordan admits raised the issue appears in Norfolk Southern's opening brief on appeal.[6] Nor did the court of appeals find the issue waived although Jordan claimed waiver there too on the contrary, and as Jordan recognizes the court simply misunderstood the issue *Id* 26 27 That an appellate court conflated slight cause with slight negligence is further evidence that this Court needs to bring clarity to the issue

2 Jordan further argues that the focus on slight negligence "did not have any effect" given that negligence was "previously[] defined elsewhere in the instructions *Id* 27 This argument is quickly dismissed Jordan fought tooth and nail to have the phrase 'even the slightest' included in the jury instruction Supp App 2a 6a Indeed he argued that it would be reversible error to omit it When during a discussion of instructions concerning 'the railroads duties," Norfolk Southern asked the court to remove the phrase "even the slightest" Jordan's counsel responded that he "would welcome you to take that out because I'll win on appeal" *Id* 6a Having gotten the instruction he fought for Jordan cannot now argue that it was meaningless

To the extent Jordan's point is that the instructions were self contradictory this illustrates confusion warranting this Court's attention In fact however

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[6] *Compare* Supp App 18a ("In the instant case the trial court instructed the jury based upon the so called watered down version of causation and negligence Justice would not be served by allowing a $4 000 000 verdict to stand on an incorrect standard of causation and negligence") *with* Opp 26 ("[t]he trial court incorrectly instructed the jury based upon the so called "watered down" version of causation and negligence" (quoting Norfolk Southern's reply brief on appeal))

the meaning of the instruction could not be clearer The court instructed the jury that FELA

> imposes liability on the railroad employer when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence *even the slightest* on the part of the employer

Pet App 70a (emphasis added) This language was a clear invitation to the jury to impose liability based on some lesser quantum of negligence than otherwise would be required as the courts embracing slight negligence recognize [7] That the instruction elsewhere also discusses negligence in general terms see Jordan App 25a does not remotely lessen the error of the "slightest negligence standard E g *Deserant* v *Cerillos Coal R R* 178 U S 409 421 (1900) (reversible error where the relevant legal principle was properly stated in the general instruction but "materially modified in the application portion of the instructions)

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[7] *See Hileman* v *Pittsburgh & Lake Erie R R* 685 A 2d 994 995 96 (Pa 1996) ("the slightest bit of negligence is sufficient for a finding of liability under the FELA") *see also Seeberger* v *Burlington N R R* 982 P 2d 1149 1150 (Wash 1999) (providing that FELA "requires the worker provide only slight evidence his injuries were foreseeably the result of the railroad's breach of its duty)

CONCLUSION

For the foregoing reasons and those set forth in the petition the petition for a writ of certiorari should be granted

Respectfully submitted

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SUPPLEMENTAL APPENDIX A

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

NO CT004175-03D2

THOMAS DAVID JORDAN,
Plaintiff,

vs

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, A Corporation and NORFOLK SOUTHERN RAILWAY COMPANY, A Corporation

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OBJECTIONS TO COURT'S CHARGE

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[1] BE IT REMEMBERED, that the excerpt of the above captioned Cause came on to be heard on the 7th & 8th days of February, 2006, beginning at approximately 10 00 a m before the HONORABLE JAMES RUSSELL, Judge Presiding, when and where the following proceedings were had to wit

* * *

[12] THE COURT Let s look on down to the bottom of Page 8 where we'll pick up with the beginning of the instructions that apply to the— explain the legal concepts that apply to everyone

Again, this is taken straight almost from the TPI in certain instances, to fit our case That covers pages, the bottom of Page 8 through the top of Page 13 Any questions, comments suggestions or changes either by way of addition or deletion?

MR GIBSON Norfolk Southern has no objection to that portion of the Charge through the top of Page 13

MR KEITH Judge I really have no objections But I'm just a little bit concerned, I guess As you know the standard of causation is different under a FELA claim versus Burlington Northern

Your Honor instructed them on proximate cause as it relates to Norfolk Southern, but that [13] doesn't apply Your Honor just read the Rogers decision, actually We've just covered that ground Just not—I think that I see what's going on I think in terms of the preponderance of the evidence and all that, that s fine There's a difference between a legal cause and proximate cause

MR GIBSON I will say this We prefer language centered around proximate cause to legal cause going back to the old days And if Mr Keith wants to use the old TPI proximate cause language, we would prefer that

MR KEITH No We ain't going to use that

THE COURT Let me make this comment and see what you think One of the reasons I wanted to take another look at Rogers was because we have a situation—we re probably going to get into this more specifically when we get around to the verdict forms

Frankly if you looked at the verdict form that Mr Spencer prepared, you d see he s approaching this conceptually different I've wrestled with that aspect of it because you have a [14] comparative fault case As far as I know there s been no decision rendered by any appellate court in Tennessee or any other jurisdiction that deals with the concept of compara tive fault in an FELA world

And I was trying to capture notions of comparative fault The thing I was looking back at Rogers for was to see how the Supreme Court discussed negligence issues Sure enough, they even—it makes reference to the term "fault,' and that concept is captured in Rogers I thought, well that's good it helps

There seems to be no reason why not to blend comparative fault into the whole picture, and so that's what I've tried to do Frankly, using fault terminology and concepts if you think about it, the FELA is the mother of all comparative fault I mean, that's where it all began How much further do we need to go?

MR KEITH I think I agree with all that I agree with the way Your Honor has approached it from that perspective I think my concern is going to be addressed more specifically when we talk about the FELA and the railroad I [15] think we can talk about it, if we need to, then

MR GIBSON Your Honor, if I may When we get into the next phase,—I guess that's where we're going—I'll just state that Norfolk Southern prefers the alternate instruction beginning the middle of Page 14 to the instruction that immediately preceded it

THE COURT Actually, the term "alternate instruc tion" was to have been deleted in this draft

MR GIBSON It all goes in?

THE COURT It all goes in

MR GIBSON I have no objection to that

THE COURT That heading was to have been taken out If I m in the right place—I'm in the right place And, yes, that heading was to have been deleted

* * *

[28] THE COURT I think in being good stewards of our time, the best way to approach this [29] is to go through, almost paragraph by paragraph and see if there is any objection or suggestion from anyone

At the top of Page 15 there is the language that you see in just about every FELA case "A railroad is not an insurer of the safety of its employees " Anything wrong with that?

MR GIBSON No, sir

THE COURT Mr Keith?

MR KEITH I m sorry, Judge, I m trying to flip where you are

THE COURT Page 15

MR KEITH No objection

THE COURT The next paragraph No liability may be imposed upon the railroad unless the evidence disclosed proves that it failed to exercise reasonable and ordinary care, that any such failure in whole or in part, legally caused the injuries of the Plaintiff

MR GIBSON No objection by Norfolk Southern

MR KEITH I see where Mr Barber objected to these instructions Judge, what I think—you ve already established the burden one [30] time with the general instructions, now you're basically establishing them again I think technically it's right

Right there which comes back to my explanation you use the language 'in whole or in part But nowhere has it been defined where you got that language and why we have that language, and that that is the standard of legal causation under the

FELA which I think is very important It's just thrown out to them And that would be my objection on that basis

THE COURT Actually, I quoted from the statute "in whole or in part" on Page 14 If that's an objection, the objection will be overruled and the Charge will be as given here Let's go to Unavoidable Risks or Dangers

MR GIBSON No objection by Norfolk Southern

MR KEITH I've never seen it before, I had not ever—I don't guess I have any objections to it I don't like it But I think that, I do think that it's overly heavily-skewed to the railroad

THE COURT Let's move on to Defect or [31] Insufficiency in Tracks or Equipment

MR GIBSON There's only one objection I have Your Honor, on Page 16 I have filed a brief in support of our request for instruction number one, which addresses the language from Rogers, quote, "even the slightest," closed quote, and why it's not applicable

And may I just stand on that brief and enter an objection only to that clause quote "even the slightest appearing in this draft on line five Page 16?

THE COURT Are you suggesting that the "even the slightest" words be taken out of that paragraph when it's used everywhere else?

MR GIBSON That's the substance of the brief, Your Honor The brief covers earlier decisions by the U S Supreme Court and some subsequent commentaries in cases It reaches the conclusion that the U S Supreme Court denied for that to be a part of an instruction on causation to the jury

THE COURT Well, do you suggest taking it out of this paragraph and leaving it everywhere else or are you suggesting taking it out [32] altogether?

MR GIBSON Altogether Bear in mind, I'm not talking about "in whole or in part,' I m talking about "even the slightest "In whole or in part," of course, is in the statute I don't object to that

I think this is the only place where you have "even the slightest" If you've got it anywhere else, I object to it anywhere else but hadn't spotted it You've got 'in whole or in part" throughout the instructions regarding the railroads' duties and I cannot object to that because it s in the statute

MR KEITH Judge, I hope that—I dang sure hope we get a verdict in this case for us But in the event that we don t, then I would welcome you to take that out because I know I'll win on appeal

That is the standard of causation under the FELA which is exactly the point I was just driving home a minute ago It says Legal cause of damage—we can go pull Rogers, you just read from that and that s what it said That's what Rogers and the United States Supreme Court and [33] every court that's interpreted it says

Legal cause of damage or complaint Any part, no matter how small,—and that s really the standard—in bringing about or actually causing the injury or damage

THE COURT Well frankly, I may have missed the point of your brief, Mr Gibson If you ll bear with me a second I think I need to get it off my desk

(Judge retrieves documentation)

MR WILLIAMS, SR Your Honor, is there any reason for the corporate representatives to stay here or can they leave?

THE COURT Thank you I'm as comfortable as you are there's no reason for any of the parties to stay unless you want to and want to be a part of, or consulted in, any of this I take that as a request that all the folks seated behind counsel table be allowed to leave if they like

(Parties exit courtroom)

THE COURT I wasn't real sure when I read this—I want to take up the requested instructions one by one from everyone, and I'm not [34] sure if now is the time to get into Norfolk Southern's Request No 1 which was supported by significant memorandum points and authorities

I didn't get the notion, Mr Gibson that this brief was intended to go into the esoteric rationale behind the language "even the slightest" And I made a point as I was ruling on the Motion for Directed Verdict and in reviewing the Rogers case I think I commented that there are legal pundits who have written I think somewhat extensively, on the point of the language "even the slightest"

There's that school of thought that would argue that the language even the slightest" was not intended as a measure of damages to be explained to the jury and used in jury instructions Rather, it was intended as a standard of review for appellate courts when they look at the trial record to determine if there is any evidence—material evidence to support a verdict

And what would be argued there is the appellate courts are to be governed by this "even the slightest

language, not juries Frankly, is [35] that where you re pitching this or are we going in a different direction?

MR GIBSON The brief is a little bit different It's not so much appellate standard as it is talking in terms of multiple parties in these cases To me, the crux of the brief is the language "proximate cause" The damage is done to the language of proximate cause when "even the slightest" is added to the causation instruction

That the intent of the act, and the decision by the Supreme Court is to use that "in whole or in part" to define the railroad's exposure to negligence standards That's the way I see it

THE COURT Is the suggestion now up for discussion to delete the use of the words "even the slightest" here and everywhere else?

MR GIBSON If it appears anywhere else I've missed it if it does

THE COURT It appears in the very next sentence

MR GIBSON Then twice

THE COURT It's there in other places, too

MR GIBSON And anyplace that it [36] appears I'm sorry I just I hadn't had time to review this as carefully as I would like I've missed all of those except the one I called the Court's attention to The intent of the objection was to take that language out wherever it might appear

THE COURT Well without going back over the Rogers case and all that we've said earlier,—even in connection with the Motion for Directed Verdict—if the suggestion as I understand it is to delete any use of the phrase 'even the slightest " the Court is of

the considerate opinion that that phrase is so deeply entrenched in the law of FELA cases, that it has become a part of the jury instructions with regard to, at least, every FELA case this Judge has been involved in, either as a trial lawyer or now as a sitting judge, and that it should not be removed and should be included in the Charge to the jury

MR GIBSON Your Honor Norfolk Southern has no objection to the Safer Manner of Doing Work also on Page 16

MR KEITH Your Honor could I make this suggestion? I don't know if it makes any [37] difference or not Just the way—here's how my simple mind reads these instructions

I think they're well written instructions I think Your Honor's done a good job On the flow of it first at one point it starts talking about what our obligation is, then the railroad doesn't have to do this, this and that

I would recommend that we take the bottom of Page 15 where it says, "The law under which Plaintiff brings this action ", and I would recommend that we take that paragraph and pull it up to the top of the page, up to right before where it says "A railroad is not an insurer of the safety of its employees," on that same page Also, where it talks about safer manner of doing work,' pull that up here too

Then what'll happen is after that point we should start talking about what the FELA is not and why it's not an insurer of its employees safety I don't know if that makes a difference I think that may be the biggest problem I have reading this, and I think that may be why Mr Barber thought it was unfair too

I think what I see going on is really [38] kind of jumping around Let's talk about how good it is and talk about this, this this I think if it first talks about the obligations of how we prove our case, and then it talks about what the railroad doesn't have to do, if we set it up in that kind of order, I think we flow better and I think it would be more balanced

MR GIBSON I didn't follow any of that I'm sorry Your Honor I can't comment 'till I see it on paper and I didn't follow any of that

MR KEITH I guess—here's what I'm talking about Page 14 It starts out on Page 14—maybe I can make my point more clear—and it says it first sets out what is the FELA and essentially what the FELA is X, Y, and Z And then right under where you have the Alternate Instruction, which will be deleted, it says it is established in this case that certain things under this statute have already been proven and are agreed to

Then you go and state, "This is a negligence action This means that before Plaintiff can recover, he must prove that his [39] injury resulted in whole or in part, from the negligence or fault of this Defendant "

We've got the issue with the Workers' Comp thing After that what I would suggest is we go right into "The law under which Plaintiff brings this action provides that Defendant shall be ", and it talks about what their obligations are under this law

And it gets into, you go on into 'even the slightest" It talks about the duty of the railroad under this law and the duty of the Defendant to use ordinary care and provide suitable tools Then you get into the notice thing

I think at the end, what we would do is put in this stuff about the railroad is not an insurer of the safety of its employees' negligence and no liability may be imposed upon the railroad unless the evidence -and that's how you wrap it up, and then you get into our negligence And it makes sense, what I m saying to the Court I think that is a more balanced way of approaching it

* * *

SUPPLEMENTAL APPENDIX B

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS SHELBY COUNTY

NO CT004175 03D2

THOMAS DAVID JORDAN,
Plaintiff,

VS

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY, A corporation and NORFOLK SOUTHERN RAILWAY COMPANY a corporation,
Defendant

DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S RULE 50 02 AND 59 02 MOTIONS

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[1] Defendant, Norfolk Southern Railway Company ("Norfolk Southern') pursuant to Rule 50 02, Tennessee Rules of Civil Procedure, moves the Court to set aside the verdict returned in this case and the judgment entered on the verdict and to enter judgment in accordance with Norfolk Southern's motion for a directed verdict Grounds for this motion are

At the close of all of the proof, Norfolk Southern moved the Court to direct a verdict in its favor on the grounds that the sole basis for recovery alleged against Norfolk Southern was failure to furnish a safe place to work because of close track clearances and that the proof established that Norfolk Southern

was in compliance with T C A § 65 6 205(d), the controlling standard on track clearances The Court denied [2] the motion, Denial of the motion was erroneous and should be corrected on this post trial motion

Alternatively pursuant to Rule 59 02, Tennessee Rules of Civil Procedure Norfolk Southern moves the Court for a new trial on the following grounds

1 The verdict and the judgment entered on the verdict are excessive

2 The verdict is so excessive as to indicate passion, prejudice or caprice on the part of the jury

3 The verdict is against the weight and pre ponderance of the evidence

4 The Court erred in giving its instructions to the jury in the following respects

The Court, over the objection of Norfolk Southern, instructed jury as follows

> The law under which plaintiff brings this action provides that defendant shall be liable for injury resulting "by reason of any defect or insuffi ciency due to its negligence, in its cars, engines, appliances machinery, tracks, roadbeds, work, or other equipment" This statutory provision does not mean that the railroad employer is responsible for injury of an employee merely because it was caused by some defect or insuffi ciency of one of the items referred to To the contrary, the statute imposes liability on the railroad employer only when the defect or insuf ficiency is due to negligence, *even the slightest*, on the part of the employer If there is an injury as

> the result of some defect or insufficiency, you must decide the extent to which such defect or insufficiency was due to negligence, *even the slightest* on the part of the railroad (Emphasis supplied)

[3] This instruction was erroneous The degree of negligence to be applied in this case is correctly stated in Norfolk Southern s request for Instruction No 1, denied by the Court, which reads as follows

> If you find that the railroad was negligent, you must next determine whether the railroad's negligence caused the plaintiff's injury in whole or in part You need not find that the railroad s negligence was the sole cause, but you must find that it was a proximate cause of the plaintiff's injury In order to find that it was a proximate cause you must find that the injury was the nature and probable consequence of the railroad's negligence, and that the railroad's negligence was a substantial factor in bringing about the injury
>
> You may not find that the railroad s negligence was a proximate cause if it merely created an incidental condition or situation in which an accident otherwise caused, resulted in the plaintiff's injury

In support of its contention that the Court committed error, Norfolk Southern incorporates into this motion by reference the contents of its brief in support of jury instruction request No 1, filed in this cause on February 3, 2006

* * *

SUPPLEMENTAL APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE,
WESTERN SECTION

Shelby County Circuit Court
No CT-004175-03

THOMAS DAVID JORDAN,
Plaintiff/Appellee,

v

BURLINGTON NORTHERN SANTA FE
RAILROAD COMPANY, a corporation,
Defendant/Appellee/Counter Appellant,

No W2007 00436 COA-R3 CV

NORFOLK SOUTHERN RAILWAY
COMPANY, a corporation
Defendant/Appellant/Counter Appellee,

BRIEF OF APPELLANT,
NORFOLK SOUTHERN RAILWAY COMPANY

---

* * *

[31] While the main opinion clearly states that (1) common law principles apply to the FELA unless expressly rejected and (2) the proximate causation standard applied at common law to the issues of negligence and the issue of contributory negligence The main opinion fails to spell out the obvious conclusion that *proximate cause* is the appropriate

standard in FELA cases, not a watered down version of both causation and negligence as suggested by some courts

In a concurring opinion, Justices Souter, Scalia and Alito joined in the opinion drafted by Chief Justice Roberts, but went one step further and announced the appropriate [32] causation standard in FELA cases to correct the misconceptions subsequent to the *Rogers* decision Specifically, the concurring opinion states the following

> **Despite some courts' views to the contrary, *Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm, the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury**

Id at 809 (emphasis added)

The concurring opinion reiterated the statements in the main opinion as follows Prior to FELA it was clear common law that a plaintiff had to prove that a defendant s negligence caused his injury proximately not indirectly or remotely " *Id* at 810 The concurring opinion also stated the following

> FELA changed some rules but as we have said more than once, when Congress abrogated common law rules in FELA it did so expressly FELA said nothing, however, about the familiar proximate cause standard for claims either of a defendant employer s negligence or a plaintiff employee s contributory negligence and through out the half century between FELA's enactment and the decision in *Rogers*, we consistently

recognized and applied proximate cause as the proper standard in FELA suits

* * *

Rogers left this law where it was We granted certiorari in *Rogers* to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes

* * *

True, I would have to stipulate that clarity was not well served by the statement in *Rogers* that a case must go to a jury where "the proofs justify with reason the conclusion that employer negligence played any part even the slightest, in producing the injury or death for which damages are sought' *Ibid* But that statement did not address and should not be read as affecting the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations It spoke to apportioning liability among parties, each of whom was understood to have had some hand in [33] causing damage directly enough to be what the law traditionally called a proximate cause

The absence of any intent to water down the common law requirement of proximate cause is evidence from the prior cases on which *Rogers* relied

Id at 811

The concurring opinion points out that just eight years prior to the *Rogers* decision in *Coray v Southern Pacific Co*, 335 U S 520, 'Justice Black unambiguously recognized proximate cause as the standard applicable in FELA suits" *Id*

In the instant case, the trial court instructed the jury based upon the so called "watered down" version of causation and negligence This Court should enter an order granting Defendant Norfolk Southern a new trial such that Plaintiff in the instant case bears the burden of establishing the fundamental elements of negligence—duty, breach, causation, and damages—as stated by the United States Supreme Court in *Coray* and *Sorrell* Justice would not be served by allowing a $4 000 000 verdict to stand on an incorrect standard of causation and negligence

* * *

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No. 09-788

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THOMAS DAVID JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 09-788

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THOMAS DAVID JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78

[1] In accordance with Rule 37.2(a), AAR has provided notice of its intent to file this brief to counsel for petitioner and respondent. The parties consented to AAR's filing of an *amicus* brief. Letters expressing consent have been filed with the Clerk of the Court. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry, including participation as *amicus curiae* in cases raising significant legal and policy issues. This case, arising under the Federal Employers Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue.

FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend about three quarters of a billion dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

Echoing prior decisions of some other lower courts, the court below erroneously sanctioned the application of a relaxed standard of causation in FELA cases, a ruling that is at odds with the plain language of the statute, Congressional intent and prior decisions of this Court and other courts. Confusion and disagreement over the proper standard of causation (and, for that matter, negligence) have existed for decades in the lower courts and show no sign of

abating. These issues are relevant in virtually every FELA lawsuit, and the way in which they are interpreted by courts can affect the outcome of a case. Therefore, AAR members, who make up the vast majority of FELA defendants, have a strong interest in seeking definitive guidance from this Court on the standard of causation.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation. As a trade association representing the nation's major railroads, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

This Court should grant the petition in order to provide guidance on a fundamental issue arising under FELA that has been the source of confusion and lack of uniformity for many years: the proper standard of causation. Time and again, in providing jury instructions, ruling on dispositive motions, and in reviewing such matters on appeal, some lower

courts have held that a more "relaxed" burden applies to plaintiffs in proving causation in FELA cases than would in an ordinary common law action. Many of those decisions demonstrate that how courts interpret this concept can have a significant impact on the outcome of a case. In contrast, other courts hold that FELA plaintiffs must show proximate cause. Only clarification of the proper standard of causation by this Court will end the intolerable lack of uniformity on this fundamental issue.

The language of the statute, the legislative history and early decisions of this Court show that Congress did not intend to modify the common law standard of causation when it enacted FELA in 1908. Congress expressly modified some of the prevailing common law defenses that made recovery more difficult, including the traditional contributory negligence doctrine, but these modifications did not address the causation standard. Consequently, in the years following FELA's enactment this Court consistently held that plaintiffs had to prove their injuries were proximately caused by the defendant's negligence. Neither subsequent amendments to FELA, nor this Court's decision In *Rogers v. Missouri Pac. R.R.*, offers support for lower court decisions that hold otherwise.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION AND CLARIFY THE PROPER STANDARD OF CAUSATION AND NEGLIGENCE UNDER FELA BECAUSE THEY ARE FUNDAMENTAL ISSUES ARISING UNDER THE STATUTE WHICH CONTINUE TO BE THE SUBJECT OF CONFUSION AND LACK OF UNIFORMITY IN THE LOWER COURTS

One hundred years after FELA's enactment, lower courts are confused and divided over a fundamental element of every cause of action brought under this important federal statute. The time is long due for this Court to address the issue of the proper standard of causation under FELA, a question which it broached, but ultimately did not address, in *Norfolk Southern Ry. Co. v. Sorrell*, 459 U. S. 158 (2007). While there was little controversy over this issue during the first half century after FELA's enactment, the subsequent fifty years has seen confusion and inconsistency. As the California Court of Appeals observed, "[i]t is almost impossible to frame a definition of causation for F.E.L.A. cases . . . because the federal decisions cannot themselves be fully harmonized on the subject." *Parker v. Atchison, Topeka & Santa Fe Ry. Co.*, 263 Cal.App.2d 675, 678, 70 Cal. Rptr. 8, 10 (Cal. App. 1968). Moreover, as with the standard of causation, the standard of negligence under FELA also is the subject of confusion and absence of uniformity. "There is a federal circuit split as to whether the relaxed FELA standard applies only to causation, or applies to the fault prong of FELA negligence as well." *Montgomery v. CSX Transp., Inc.*, 376 S.E.2d 20, 26 (S.C. 2008). A relaxed standard applies neither to negligence or causation.

A. The Erroneous Interpretation of FELA's Causation Standard by the Court Below and Other Lower Courts Has and Will Continue to Have A Real Impact on the Outcome of FELA Cases

As Petitioner explains, a transformation has occurred in FELA jurisprudence over the past fifty years to the point where there is a serious split of authority in the lower courts on the standard of causation [Pet. at 11-14] and negligence [Pet. at 15-18] that applies in FELA cases. Typically, courts erroneously ascribe to this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957), an intent to "relax" the standard of causation under FELA, often utilizing colorful metaphors to describe this alleged statutory metamorphosis.[2] For example, the Seventh Circuit explained that to sustain a jury verdict in a FELA case requires "evidence scarcely more substantial than pigeon bone broth." *Harbin v. Burlington Northern R.R.*, 921 F.2d 129, 132 (7th Cir. 1990); *see also*, *Rivera v. Union Pac. R.R.*, 378 F.3d 502, 506 (5th Cir. 2004) (calling the plaintiff's burden of proof "featherweight").

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[2] *E.g.*, *Williams v. Long Island R.R.*, 196 F.3d 402, 406 (2nd Cir. 1999); *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 606-07 (9th Cir. 1993); *Beeber v. Norfolk Southern Corp.*, 754 F. Supp. 1364, 1372-73 (N.D. Ind. 1990). The Second Circuit has interpreted *Rogers* as granting a license for even further judicial amendment of FELA, explaining that while "[t]he Supreme Court has not expressly held that a relaxed standard of negligence, as distinguished from causation, applies under FELA [citation omitted] [ ] numerous appellate courts, including ours, have construed the statute, in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation." *Uflik v. Metro-North Comm. R.R.*, 77 F.3d 54, 58, n.1 (2nd Cir. 1996).

The petition aptly notes that the deep split among lower courts that has emerged since *Rogers* was decided has resulted in "a half-century's worth of disarray among federal and state courts alike." Pet. at 3. Moreover, this is "disarray" that makes a difference. When a court employs erroneous standards governing the essential elements of a civil action, either in formulating jury instructions or ruling on dispositive motions, it can affect the outcome of the case. This point was recently underscored by a district court which, referring to FELA's purported "relaxed standard for proving causation," explained that while the plaintiff's "first claim might not survive a motion for summary judgment in the traditional tort context, the low negligence threshold of FELA ensures that this count will live to see another day." *Gibbs v. Union Pac. R.R.*, 2009 WL 3064956, at *4 (S.D. Ill. 2009).

The Fifth Circuit's opinion in *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110 (5th Cir. 1985) offers a vivid illustration of how the standard of causation applied by a court can be outcome determinative. The railroad had hired a local cab company to transport the plaintiff from the point where he disembarked from a train late at night to the railroad's yard offices. In route, the driver stopped the cab on the road without turning on the emergency flashers. The cab was hit from the rear by another motorist, injuring the plaintiff. Asserting that the "common-law proximate cause standard is modified and the employee has a less demanding burden of proving causal relationship," *id.* at 1113, the Court affirmed the jury's verdict finding the railroad liable, allowing the jury a wide berth to make inferences supporting its verdict.

The case also involved a state law indemnity action by the railroad against the cab company, its agent.[3] Under the very same set of facts, the Court of Appeals affirmed the denial of the railroad's claim, upholding the lower court's finding that the cab driver was not negligent. The Court held that "even though the jury found that [defendant] was liable to Armstrong [in the FELA action] because of the negligent conduct of its agent, the district court was neither constrained nor required to find the negligence of [the cab company] proximately caused Armstrong's injury." *Id.* at 1115. The Court explained that the railroad's "argument ignores the different causation standards of the two actions . . . The standards of liability for negligence under §1 of [FELA] are significantly broader than in ordinary common-law negligence actions." *Id.* Thus, the very conduct that gave rise to liability in the FELA action, did not support liability in the indemnity action, an outcome directly attributable to the Court's ruling that a different, "significantly broader" standard of causation applies under FELA. *Id.*

Not only does the *Armstrong* decision demonstrate starkly how applying a relaxed causation standard can affect the outcome of a case, it highlights the inherent unfairness of such a rule. *Ayers* suggests that the impact of holding railroads jointly liable for the negligence of other tortfeasors is mitigated by the railroads' right to seek indemnity under state law. However, the fairness of this balance is undermined

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[3] In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that while joint and several liability applies to FELA, railroads have the right to bring indemnity and contribution actions against third parties under applicable state or federal law. *Id.* at 162.

if railroads face a relaxed standard of causation as FELA defendants, but must prove proximate cause as indemnity plaintiffs.

Other examples of the impact of FELA's purported "relaxed" burden abound. In ruling on a railroad's summary judgment motion, the court described the plaintiff's case as "weak" and stated that the evidence "cast substantial doubt on the ability of Plaintiff to meet even the low bar of proof required in a FELA case." *Kreig v. CSX Transp., Inc.*, 2006 WL 2792406, at *2 (W.D. Ky. 2006). Nevertheless, the court denied the motion. The court based its ruling on its view that the "[p]laintiff's burden is significantly lighter than in an ordinary negligence case," with its comments strongly suggesting that the outcome would have been different had this not been a FELA action. *Id.*

In *Davis v. CSX Transp., Inc.*, 2005 WL 1935676, at *1 (W.D. Ky. 2005), the Court explained that the "burden of proof of causation under FELA is relaxed compared to ordinary negligence actions" and therefore the plaintiff "need offer little more than a scintilla of evidence that the employer's negligence played any part in the plaintiff's injury." As a result, the Court dispensed with the need for the plaintiff to offer evidence connecting the alleged negligent conduct (allowing pools of grease to accumulate in the yard) to her injury (losing her footing and falling off a boxcar sill step), and denied the railroad's motion for summary judgment. *Id.* at *2.

In *Koller v. Burlington Northern Santa Fe Ry. Co.*, No. CIV S-01-914 GGH (E.D. Calif. 2002), the plaintiff brought a FELA action based on his employer's failure to prevent an assault by a third party. The Court evaluated the railroad's motion for summary

judgment under the premise that "[i]n a FELA case, the causation standard is relaxed" and "the jury's power to engage in inferences is significantly broader than in common law negligence actions." Examining the evidence in the context of these legal conclusions, the court denied the railroad's motion "given the weakened causation standard in FELA cases."

Even in the rare instance where a trial court grants a defendant's dispositive motion in a FELA case, where courts apply a relaxed standard of causation and negligence such rulings typically do not survive appellate review. For example, in *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81, 84 (Ky. App. 2006), the trial court granted summary judgment for the railroad, finding that "it does not appear that the testimony of either of Plaintiff's physicians provides the necessary testimony stated within a reasonable degree of medical probability to establish causation on the part of CSX." However, the Kentucky Court of Appeals reversed, no doubt influenced by its view that "Congress intended FELA to be a departure from common law principles of liability . . ." and that "FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases." *Id.* at 83-84.

Not only is application of a "relaxed" causation standard often outcome determinative, the lack of uniformity that prevails is unlikely to resolve itself. This Court's decision in *Sorrell* may have extinguished the notion that a different standard of causation applies to employer negligence than to employee contributory negligence; however, post-*Sorrell* decisions offer scant reason to believe that *Sorrell* will impact the outlook of lower courts on the more fundamental issues of the substantive standards of causation and negligence in FELA cases.

For example, the Fifth Circuit asserted that the relaxed burden FELA purportedly places on plaintiffs calls for courts to handle FELA cases differently than other common law negligent actions, explaining that "the FELA 'complete absence of probative facts' standard is in sharp contrast to the more demanding test applicable in *other* civil cases." *Howard v. Canadian Nat'l/Illinois Cent. R.R.*, 233 Fed. Appx. 356, 357 (5th Cir. 2007). Similarly, a federal court in Louisiana summarized the judicial attitude about FELA cases when it found that "FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Kansas City Southern Ry. Co. v. Nichols Construction Co.*, 574 F.Supp.2d 590, 594 (E.D. La. 2008). *See also Medwig v. Long Island R.R.*, 2007 WL 1659201 (S.D.N.Y. 2007)(adhering to Second Circuit precedent which holds that both a relaxed standard of causation and negligence applies in FELA cases, finding that *Sorrell* did not overrule that precedent). Clearly, lower courts remain in need of guidance. *See e.g., Mills v. CSX Transp., Inc.* 2009 WL 4547685, at *5, n. 4 (Tenn. 2009) ("It is not entirely clear which standard of causation *Rogers* applies to FELA cases—the common law standard or a relaxed standard."); *Montgomery supra* ("[T]he *Sorrell* Court did not establish precisely what the FELA standard for causation is." 656 S.E.2d at 27.); *Hall v. Norfolk Southern Ry. Co.*, 2007 WL 2765540, at *6, n.2 (N.D.Ga. 2007) ("With respect for [sic] a standard of causation, the Supreme Court continues to debate the precise contours of its holding in *Rogers*.")

The "relaxed" standard that has become entrenched in many jurisdictions will continue to impact numerous cases in the future. Several thousand FELA lawsuits are filed each year. Except in the

occasional case where the railroad defendant admits liability, negligence and causation are elements of the plaintiff's case in each such lawsuit. The "relaxed" standards utilized by some courts will continue to make recovery of damages more likely—often virtually assured—in FELA cases, as many courts will continue to see FELA's overarching purpose as promoting recovery. *See Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638, 641 (6th Cir. 1974) ("FELA's liberal purpose must be kept in mind when confronting arguments that would restrict an employer's liability under the Act.") However, while many courts may believe that guaranteed recovery for rail employees injured on the job is good public policy, it was not Congress's intent to guarantee recovery in all cases.

B. FELA Was Meant to Incorporate Common Law Concepts of Negligence, Including Proximate Cause

When FELA was enacted there was little reason to foresee that the concepts of negligence and causation, fundamental elements of the statutory remedy, would elude clear definitions so far into the future. Since *Rogers*, however, some courts have discerned a legislative intent that nowhere appears in the statute or legislative history. *E.g., Hausrath v. N.Y. Cent. R.R.*, 401 F.2d 634, 637 (6th Cir. 1968)("Congress deliberately adopted a negligence standard different from that of the common law."); *Magelky v. BNSF Ry. Co.*, 579 F.Supp.2d 1299, 1305 (D.N.D. 2008) ("FELA's most distinctive departure from the common law is in the area of causation. . . . To impose liability on the defendant, the negligence need not be the proximate cause of the injury.") Curiously, Congress never saw fit to mention this so-called "distinctive" and "deliberate" departure from common law.

Congress enacted FELA in 1908 in response to what was perceived as an intolerably high injury rate in the railroad industry.[4] At that time, the concept of no-fault workers' compensation—today the predominant method of compensating workplace injuries—had not yet gained a foothold in the United States. Therefore, Congress adopted what was then the universal compensation model in the United States: the law of negligence. The policy embodied in FELA was straightforward: railroads were to be liable in damages for injuries sustained by their employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad. 45 U.S.C. §51.

FELA embraced the concept of common law negligence, while expressly modifying some of the harsher aspects of nineteenth century common law which often erected insurmountable barriers to recovery by workers sustaining job-related injuries.[5] To ameli-

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[4] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, Statistics of Railways in the United States 1908, 41, 99 (1909). On several occasions at the end of the previous century, President Harrison had admonished Congress to act to protect rail employees, a plea which resulted in enactment of the Safety Appliances Act, c. 196, 27 Stat. 531 (1893), the first federal railroad safety legislation. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904).

[5] For example, recovery was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Sioux City R.R.*, 9 N.W. 581 (Minn. 1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). The fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and

orate the harsh results which often were a consequence of prevailing legal doctrines, Congress made several specific changes to existing common law. For example, in an effort to promote recovery, the defenses of assumption of the risk and the fellow servant doctrine were eliminated. 45 U.S.C. § 54; *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916).[6]

Additionally, in what, for the time, was a significant innovation in tort law, FELA incorporated the doctrine of comparative fault. The prevailing rule in the United States in the nineteenth century was that contributory negligence by the plaintiff completely barred recovery, even if the defendant also was at fault. *E.g., Louisville, Nashville & Great Southern R.R. v. Fleming*, 82 Tenn. 128 (Tenn. 1884) ("In England and a majority of the States of the Union, the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action.") Under FELA, rather than completely barring recovery, if the employee's negligence contributes to the injury damages are reduced in proportion to the employee's negligence. 45 U.S.C. §53.[7]

Despite Congress' decision to modify or eliminate some of the prevailing common law defenses, there is

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against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842).

[6] Initially, FELA eliminated the assumption of the risk defense only in cases where the railroad violated a safety statute. In 1939, Congress amended FELA to eliminate the assumption of the risk defense in all FELA cases. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404. *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 65 (1943).

[7] Contributory negligence is not considered if the injury is caused by violation of a safety statute.

no evidence that Congress believed it was modifying the core concept of negligence that underlies the statute. Contemporaneously with the statute's enactment, the Senate reported that FELA "revises the law as now administered in the courts in the United States in four important particulars." S. Rep. No. 460, 60th Cong., 1st Sess. 1 (1908). Specifically, the Senate Report described these revisions to the common law as addressing the fellow servant doctrine, assumption of the risk, contributory negligence and prohibiting contracts that relieve the employer of liability. *Id.* at 1-3. There was no suggestion whatsoever that the standards of causation or negligence were being modified. The House of Representatives offered an identical list when it described how FELA "change[d] the common-law liability of employers," H.R Rep. No. 1386, 60th Cong. 1st Sess. 1 (1908), noting in addition, that the FELA "makes each party responsible for his own negligence and requires each to bear the burden thereof." *Id.*

Similarly, this Court's understanding of the revisions of common law made by FELA did not include any modification to the standard of causation. Shortly after its enactment, the constitutionality of FELA was challenged. Among other arguments advanced by those challenging the statute was that in modifying the common law Congress exceeded its authority to regulate interstate commerce. In addressing this challenge, which it rejected, this Court described those modifications as including (1) the abrogation of the fellow servant rule; (2) the replacement of the contributory negligence rule with a scheme of comparative negligence; (3) the abrogation of the assumption of the risk doctrine where a violation of a safety statute caused the injury; and (4) the right of a personal representative to seek

damages for the death of an employee for the benefit of designated relatives. *Mondou v. N.Y., N.H. & Hartford R.R.*, 223 U.S. 1, 49-50 (1912). Again, nowhere was it suggested that replacement of the proximate cause standard by a more "relaxed" causation requirement was among FELA's modifications to the common law.. In *Sorrell*, this Court again "catalogued" the ways in which FELA departed from the common law, stating only that FELA "abolished the fellow servant rule, rejected contributory negligence in favor of comparative negligence, prohibited employers from contracting around the Act, and abolished the assumption of risk defense." 549 U.S. at 168.

Indisputably, when Congress enacted FELA it attempted to make recovery more likely than would have been the case under the prevailing law. However, it is equally indisputable that Congress envisioned that the remedy available under FELA would be consistent with the common law concepts of causation and negligence, a point consistently recognized by this Court in the decades immediately following FELA's enactment.[8] *See e.g., Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916) (The rights and obligations under FELA "depend upon applicable principles of common law. . . . Negligence by the railroad is essential to a recovery.") Consistent with that approach, in the years following FELA's enactment, this Court issued a number of decisions confirming

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[8] This Court has recognized that FELA's purpose of promoting recovery is not incompatible with proximate cause. *Brady v. Terminal R.R. Ass'n.*, 303 U.S. 10, 15 (1938) ("The statute has been liberally construed 'so as to give a right to recovery for every injury the proximate cause of which was a failure to comply with a requirement of the [Safety Appliance] Act.'")

that proximate cause is the applicable causation standard under FELA. *See e.g., Lang v. N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *St. Louis-S.F. Ry. v. Mills*, 271 U.S. 344, 347 (1926); *Northwestern Pac. R.R. v. Bobo*, 290 U.S. 499, 503 (1934).

In fact, during the first half of the twentieth century, this Court continued to articulate the traditional common law concepts of negligence and causation as the proper standards under FELA. *E.g., Tennant v. Peoria & Pakin Union Ry. Co.*, 321 U.S. 29, 32 (1944) (The employee has to prove that the railroad's negligence "was the proximate cause in whole or in part of the fatal accident."); *Bailey v. Cent. Vermont Ry.*, 319 U.S. 350, 352 (1943) (FELA has "been largely fashioned from the common law [citation omitted] except as Congress has written into the Act different standards." The employer's duty is "to use reasonable care."); *Coray v. Southern Pac. Co.*, 335 U.S. 520, 523 (1949) (Petitioner was entitled to recover if the "defective equipment was the sole or a contributory proximate cause of the decedent employee's death."); *Urie v. Thompson*, 337 U.S. 163, 182 (1949) (FELA "is founded on common-law concepts of negligence and injury."); *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949) (Negligence is "what a reasonable and prudent person would have done under the same circumstances.")

Rather than repudiating these cases, *Rogers* cited to some with approval. 352 U.S. at 506. n.11 (citing to *Coray*). Nonetheless, several federal courts of appeals, which previously had understood FELA to incorporate proximate cause, have concluded that *Rogers* requires that they repudiate their previous

holdings.[9] *See e.g., Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir. 2003) (holding that *Rogers* "announced a relaxed test for establishing causation in FELA cases," *id.* at 433, and rejecting prior Sixth Circuit decision in *Reetz v. Chicago & Erie R.R.*, 46 F.2d 50 (6th Cir. 1931), as "no longer good law in light of *Rogers*." *Id.* at 437); *Compare Anderson v. Baltimore & Ohio R.R.*, 89 F.2d 629, 630 (2nd Cir. 1937) (The issue is whether the defect "was the proximate cause of [plaintiff's] death.") *with Nicholson v. Erie R.R.*, 253 F.2d 939, 940 (2nd Cir. 1958) ("[T]o impose liability on the defendant, the negligence need not be the proximate cause of the injury."); *Larsen v. Chicago & Northwestern Ry. Co.*, 171 F.2d 841,844 (7th Cir. 1949) ("To recover under [FELA] plaintiff must prove that the defendant was negligent and that such negligence in whole or in part was the proximate cause of his injuries.") *with Coffey v. Northeast Ill. Reg. Comm. R.R.*, 479 F.3d 472, 476 (7th Cir. 2007)("relaxation of common law standards of proof applies to" causation). Some courts have asserted that *Rogers*' purported introduction of a relaxed causation standard was to conform to the 1939 amendments to FELA. *Richards supra*, 330 F.3d at 434; *Morrison v. N.Y. Cent. R.R.*, 361 F.2d 319 (6th Cir. 1966).

The *Rogers* opinion references the 1939 amendments, 352 U.S. at 509-10, but never suggests that they required a reexamination of the causation standard under FELA, for the simple reason that they did

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[9] The Tenth Circuit explained that "[d]uring the first half of this century, it was customary for courts to analyze liability under the FELA in terms of proximate causation," but that *Rogers* "definitively abandoned this approach." *Summers v. Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997).

not. The 1939 amendments were primarily intended to ease the path toward recovery by FELA plaintiffs by modifying aspects of the statute that served to prevent injured employees from recovering, either because they could not meet the strict test of interstate commerce[10] or because the employer successfully argued that the employee had assumed the risks inherent in the employment. However, the 1939 amendments did not purport to address, let alone modify, the standard of causation.

Adding a provision to section 1 of FELA, the 1939 amendments expanded the scope of FELA's coverage so that workers would no longer have to prove they were engaged directly in interstate commerce at the time they were injured in order to come within the scope of FELA's coverage. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404; *see* S. Rep. No. 661, 76th Cong., 1st Sess. 2-3 (1939); *see Southern Pac. Co. v. Gileo*, 351 U.S. 493 (1956); *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1956). In addition, in 1939, Congress amended FELA to eliminate the defense of assumption of the risk in all cases. *Id.* The 1939 amendments also increased the statute of limitations under FELA from two to three years, *id.* at §2, and prohibited railroads from establishing and enforcing rules which penalized employees for giving information concerning an accident to the injured person or his representative. *Id.* at §3. Tellingly, a railroad employee representative did not believe that Congress had eliminated the need for employees to

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[10] In order to recover, "the employee, at the time of the injury," had to be "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." *Shanks v. Delaware, Lackwanna & Western R.R.*, 239 U.S. 556, 558 (1916).

prove proximate cause when FELA was enacted in 1908, nor did he urge Congress to do so in 1939. In testimony before the House of Representatives, the General Counsel of the Brotherhood of Railroad Trainmen commented that it was unnecessary to add the word "proximately" to a provision of the act, explaining that such language would be "pure surplusage, because unless the negligence proximately caused the injury there can be no recovery."[11] Thus, there is no statutory basis for incorporating into FELA a standard of causation that differs from what Congress intended in 1908. That lower courts would suggest otherwise underscores the vital need for this Court directly to address the important issue of causation under FELA.

While many lower courts have lost sight of Congress' intent in enacting FELA, a key aspect of the *Sorrell* rationale supports the position that Congress never intended to modify the common law standard of causation. *Sorrell* held that the causation standard for employee contributory negligence was equivalent to the standard for employer negligence. 549 U.S. at 171. This Court based its decision in part on the fact that under common law the same standard of causation applied to both employer and employee negligence, which, it explained, was "strong evidence against Missouri's disparate standards." *Id.* at 168. As with the principle of equivalence of standards, proximate cause also was the common law rule when FELA was enacted. It would be curious

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[11] *Hearings on H.R. 4988 and H.R. 4989 Before the House Comm. on the Judiciary*, 76th Cong., 1st Sess. (1939) (statement of Tom J. McGrath, General Counsel, Brotherhood of Railroad Trainmen).

indeed to find that Congress adopted the common law rule of equivalence but rejected the equally entrenched common law rule of proximate cause without any statutory basis for doing so. In *Sorrell*, the plaintiff argued that use of the term "in whole or in part," in section 1 of FELA, but not in section 3, signaled that each section incorporated a different standard of causation, with section 1, which addresses employer negligence, calling for a more relaxed standard. This Court rejected that argument. In fact, *Sorrell* confirms that the "in whole or in part" language—the alleged statutory basis for the elimination of proximate cause—simply is descriptive of FELA's comparative negligence standard, under which the employer's negligence need not be the sole cause of an injury for the employer to be liable for damages (albeit, reduced damages if the employee's negligence also contributes to the injury). 549 U.S. at 170-71.

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In recent years, this Court has properly resisted entreaties to allow FELA's "remedial and humanitarian" purposes[12] to trump the language of the statute and Congress' intent. *Sorrell*, 459 U.S. at 171. ("It does not follow . . . that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees.")[13] However, taking a different

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[12] "FELA is 'a remedial and humanitarian statute.'" *Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 580 (6th Cir. 2000).

[13] In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court rejected the Third Circuit's decision to disregard common law limitations on recovery for negligent infliction of emotional distress in order to promote FELA's preference for a liberal recovery. Instead, the Court held that FELA required application of the common law zone of danger test, a test which

path, many lower courts have transformed FELA into a compensation hybrid—unlike any system in the nation—with a relaxed liability standard often all but assuring recovery, but, unlike workers' compensation laws, with full tort damages available to plaintiffs. However, that is not the law Congress enacted. This Court should grant certiorari to provide lower courts with much need guidance on the proper standard of causation—a fundamental concept that can have a profound effect on the outcome of virtually every FELA case.

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ultimately resulted in both plaintiffs' claims being rejected. In *Metro North Comm. R.R. v. Buckley*, 521 U.S. 424 (1997), consistent with the policy considerations underlying the common law limitations on emotional distress claims, this Court denied recovery for negligent infliction of emotional distress to an asymptomatic plaintiff who was exposed to asbestos, rejecting plaintiff's argument that the "'humanitarian' nature of the FELA warrants" recovery. 521 U.S. at 438. Earlier, in *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988), this Court rejected the argument that to foster FELA's humanitarian purposes, prejudgment interest be permitted even though it was not available at common law when FELA was enacted.

CONCLUSION

For the reasons stated herein, the petition should be granted.

Respectfully submitted,

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